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Supreme Court of the United States

OCTOBER TERM, 1946

No. 80

JACK PARKER, ISIDOR M. SAKS, MELVIN CAPLAN, ET AL., PETITIONERS,

vs.

PAUL A. PORTER, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

PETITION FOR CERTIORARI FILED APRIL 8, 1946.

CERTIORARI GRANTED MAY 13, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

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[fol. 1]

UNITED STATES EMERGENCY COURT OF APPEALS

JACK PARKER, ISIDOR M. SAKS, MELVIN CAPLAN, DAVID WERTH, C. Clarence Kaskel, Morton H. Baron, Robert Herrmann, Samuel Ogus, Charles Maslow, George Willett, Harry Wiener, Charles Goldman, David Rudberg, William I. Hohauser and Sydney Maybaum, Complainants,

against

CHESTER BOWLES, Price Administrator, Respondent

COMPLAINT—Filed November 19, 1945

The complainants above named, by their attorney, Alexander Pfeiffer, for their complaint herein, respectfully show to this Court, on information and belief:

1. All of the complainants are residents of the apartment house known as 55 Central Park West, in the Borough of Manhattan, City of New York, and their principal business addresses are as follows:

Jack Parker, c/o Lustra Corporation, 40 West 25th Street, New York, N. Y.

Isidor M. Saks, 630 Fifth Avenue, New York, N. Y.

Melvin Caplan, c/o Mello Textile Co., 35 West 32nd Street, New York, N. Y.

David Werth, c/o Muller Bros., 19 Palmetto Street, Brooklyn, N. Y.

[fol. 2] C. Clarence Kaskel (retired), 55 Central Park West, New York, N. Y.

Morton H. Baron, c/o Royal Paper Corp., 11th Ave. & 25th Street, New York, N. Y.

Robert Herrmann, c/o Heinrich, Herrmann & Weiss, 1199 Broadway, New York, N. Y.

Sam Ogus, c/o Sabrett Food Products, Inc., 90 East 3rd Street, New York, N. Y.

Charles Maslow, 408 East 59th Street, New York, N. Y.

George Willett, 61 Broadway, New York, N. Y.

Harry Wiener, 128 West 31st Street, New York, N. Y.

Charles Goldman, 247 W. 38th Street, New York, N. Y.

David Rudberg (retired), 55 Central Park West, New York, N. Y.

William I. Hohauser, 1841 Broadway, New York, N. Y.

Sydney Maybaum, c/o Century Ribbon Mills, 1071 Sixth Avenue, New York, N. Y.

2. The regulation involved herein is the "Rent Regulation for Housing in the New York City Defense Area", issued and effective December 26, 1944, by the Administra- [fol. 3] tor of Price Administration, with the amendments thereto hereinafter referred to.

3. The respondent, the Administrator of the Office of Price Administration, is herein referred to as the "Administrator", and the purchasers of capital stock of 55 Corporation, a New York corporation and the owners of proprietary leases of apartments in said premises now occupied by the complainants, are herein referred to as the "purchasers."

4. On October 10, 1945, the complainants filed a joint protest with the "Administrator" pursuant to Section 203A of the Emergency Price Control Act of 1942, and the amendments thereto, which said protest was docketed as Nos. RPA-II-446-P and RPA-II-458-P. Said protest of the complainants was consolidated for the purpose of disposition by the "Administrator", with the protest filed by one Mildred S. Strauss, both having been filed against the order of the "Administrator" issued and in effect on September 28, 1945, and docketed as No. RPA-II-425-P, which said consolidation was directed and ordered by the "Administrator" in his order of November 2, 1945.

5. The protests of the complainants and said Mildred S. Strauss, were filed as aforesaid against said order issued and in effect on September 28, 1945, by the "Administrator", granting the protest of the "purchasers" of the capital stock of 55 Corporation, a New York real estate corporation, organized under the Stock Corporation Laws of the State of New York, to whom had also been given and granted by the said corporation owning the premises 55 Central Park West, New York City, proprietary leases of apartments in the said premises for a term of years as follows:

The apartment of complainant Jack Parker, known as Apt. 18-F was acquired under a proprietary lease by the

[fol. 4] "purchaser" Ada M. Becker; the apartment of complainant Isidor M. Saks, known as Apt. 15-C was acquired under a proprietary lease by the "purchaser", William Floyd Davis; the apartment of complainant Melvin Caplan, known as Apt. 17-D was acquired under a proprietary lease by the "purchaser" Charles Everett; the apartment of complainant, David Werth, known as Apt. 10-A was acquired under a proprietary lease by the "purchaser" David Gordon; the apartment of complainant C. Clarence Kaskel, known as Apt. 14-E was acquired under a proprietary lease by the "purchasers" Abraham D. and Mrs. I. Bressman; the apartment of complainant Morton H. Baron, known as Apt. 14-D was acquired under a proprietary lease by the "purchasers" Adolph G. and Alice Ruthman; the apartment of complainant Robert Herrmann, known as Apt. 18-D was acquired under a proprietary lease by the "purchaser" Elzabeth Schaeffer; the apartment of complainant Sam Ogus, known as Apt. 13-F was acquired under a proprietary lease by the "purchaser" Rhoda Cartier; the apartment of complainant Charles Maslow, known as Apt. 15-E, was acquired under a proprietary lease by the "purchaser" Samuel Kipnis; the apartment of complainant George Willett, known as Apt. 18-B, was acquired under a proprietary lease by the "purchaser" William J. McEnery; the apartment of complainant Harry Wiener, known as Apt. 19-F, was acquired under a proprietary lease by the "purchaser" Harry Goldstein; the apartment of complainant Charles Goldman, known as Apt. 16-D, was acquired under a proprietary lease by the "purchaser" Joseph L. Friedman; the apartment of complainant David Rudberg, known as Apt. 15-F, was acquired under a proprietary lease by the "purchasers" Henry and Margaret H. Zaum; the apartment of complainant William I. Hohauser, known as Apt. 9-G, was acquired under a proprietary lease by the [fol. 5] "purchaser" Julius M. Levine, and the apartment of complainant Sydney Maybaum, known as Apt. 12-F, was acquired under a proprietary lease by the "purchaser" Herman Goodman.

6. The order issued and in effect on September 28, 1945, by the "Administrator" was directed against an order issued and in effect on August 31, 1945, by the Rent Director for the New York City Defense-Rental Area, and against the order of the Acting Regional Administrator for the Office of Price Administration, Region II, issued and in

effect on September 7, 1945, denying petitions of the "purchasers" for certificates relating to evictions, (Docket No. RPA-II-425-P) and to permit said "purchasers" of the capital stock of 55 Corporation and the said owners of proprietary leases of the apartments aforementioned, to pursue their remedies at local law to evict the complainants above named, occupying their respective apartments in said premises 55 Central Park West, New York, N. Y., which orders were protested by the "purchasers" by their protest filed with the "Administrator" on September 7, 1945. The said order and opinion of the "Administrator" issued and effective on September 28, 1945, reversed and disaffirmed and revoked the denial on August 31, 1945, of the Area Rent Director for the New York City Defense-Rental Area of the said applications of the "purchasers" as well as the order issued and effective September 7, 1945, of the Acting Regional Administrator for the Office of Price Administration, Region II issued and effective September 7, 1945 which affirmed the said order of the Area Rent Director.

7. A copy of said protest filed by the complainants with the "Administrator" is on file with the "Administrator" and complainants request that the same be produced by him with the transcript of the proceedings in connection with such protest and that the same be certified by him and filed [fol. 6] with the Clerk of this Court as promptly as practical, and in no event more than twenty days after the service upon the "Administrator" of this complaint, as provided by Rule 15 of the Rules of this Court.

8. The said protest filed with the "Administrator" was, as aforesaid, a joint protest, and the Acting Regional Administrator, in considering all of the aforementioned applications of the "purchasers" and the "Administrator" in his order and opinion of September 28, 1945, aforesaid, consolidated all of said applications for review and disposition, upon the ground, among others, that there was but one structure involved and a common question applying to all applications, and the complainants, in their said protest filed with the "Administrator" requested therefore that their protest be treated as a joint and consolidated protest, made in behalf of all of them.

9. That the premises known as 55 Central Park West, New York City, is an apartment house in said city, 19 stories

in height, consisting of residential apartments of different sizes, from three to nine rooms, in which premises the complainants are tenants of the apartments hereinbefore mentioned, residing therein with their families and paying substantial rents therefor. All of the complainants, tenants of said premises, have resided therein for some time, some of them for many years, many of them having spent large sums of money in the decorating of their apartments occupied by them with their wives and children, and in some instances with young children. All of the complainants are ready, willing and able to pay the rent that may be required to be paid by them for said apartments and to comply with any and all rules and regulations of the City, State and Federal Governments having application thereto, and to do whatever may be lawfully necessary and requisite to [fol. 7] be permitted to remain in and occupy the same as their homes and places of abode for their families and themselves.

10. That for many months there has existed in the City of New York, State of New York, a great emergency as to places of residence by reason of the scarcity of apartments therein and in fact there are none to be had of a kind in anywise similar to those occupied by the complainants, and in fact, no apartments are available. Hotels are overcrowded and there is a complete lack of places of abode. Because of such emergency not alone in New York City but throughout the United States, Congress enacted legislation to protect tenants of places of residence and to prevent their ouster and eviction therefrom or the increase of their rent, which legislation is known as the Emergency Price Control Act of 1942, and the amendments thereto, and Congress constituted the Office of Price Administration as the governmental agency for all of such purposes, and the "Administrator" was authorized by such legislation to enact regulations to effectuate the same. To all of such Congressional Legislation and the Regulations of the Office of Price Administration, reference is hereby made.

11. Victor M. Earle, of the firm of Earle & Calhoun, real estate brokers of the City of New York and managing agents and realtors in such city, and one Alexander B. Carver were the owners of the entire capital stock of said New York real estate corporation, known as 55 Corporation, owning as aforesaid, the fee of said premises 55 Central Park West,

New York City, subject to a first mortgage on May 29, 1945, of $1,683,000.08 and accrued interest of $4,207.50, totaling $1,687,207.58, and a second mortgage in the principal sum of $12,000, plus accrued interest of $65, totaling $12,065, and amounting in the aggregate to the sum of $1,699,272.58, and sought to convert part of the premises aforementioned [fol. 8] into a cooperative and to sell the shares of stock held by them of said owning corporation to purchasers of the same, with proprietary leases of apartments therein, the purchase price of said apartments to aggregate about $390,000 over and above a first mortgage of $1,500,000, though the said Victor M. Earle had made application as recently as March, 1945, in behalf of said owning corporation and had sworn in such application for the reduction of the New York assessed value of said premises, that said premises were worth not more than $1,000,000.

12. On March 5, 1945, said Earle & Calhoun, acting for and in behalf of said Earle and Carver and said owning corporation, having theretofore conceived the idea as aforesaid of converting certain of said apartments in said premises into cooperatives and selling shares of stock of said corporation to persons who would purchase the same and acquire at the same time proprietary leases of said apartments, wrote a certain letter to Maurice H. Whitebook, Chief Attorney for the New York City Defense Rental Area, requesting an interpretation concerning the right of purchasers of cooperative apartments in 55 Central Park West, to obtain certificates relating to eviction under the provisions of Subdivision II of Section 6(b)(2) of the Rent Regulations of the Office of Price Administration upon the claim that substantial hardship would result from the failure to issue such certificates. To this letter were attached certain affidavits and there were certain replies thereto and conferences were held, and then an alleged interpretation of hardship was granted by the Office of Price Administration on March 23, 1945, to the said Earle and Carver, the owners of such stock, so as to relieve them and purchasers of such stock and owners of proprietary leases, from the effect of an amendment of the "Administrator" to the regulations aforementioned, which amendment is known as Section [fol. 9] 6(b)(3) of the Rent Regulations for Housing as amended, effective February 17, 1945. Said amendment, as well as the provisions of Section 6(b)(2) of the Rent Regu-

lations for Housing, are hereby referred to and made a part hereof, and for the sake of brevity are referred to without being verbatim set forth herein. All of the letters aforementioned, the interpretation and affidavits which formed part of said letters, became part of the record made in connection with applications thereafter filed by the "purchasers" of said capital stock of said 55 Corporation and the holders of proprietary leases of apartments for certificates of eviction of the complainants from their apartments, which record also consists of testimony taken by Ira A. Schiller, Chief Branch Attorney of the New York City Defense-Rental Area, and exhibits and other papers and documents introduced before him, which he considered in accordance with his designation to conduct an oral hearing upon said applications, pursuant to Section 1300.211 of Revised Procedural Regulation No. 3, of the Office of Price Administration, having been duly appointed and designated for that purpose to pass upon the questions involved in the applications of the "purchasers" of the said stock aforementioned and the holders of proprietary leases, for such certificates of eviction, and to report his findings thereon. Said Ira A. Schiller, Chief Branch Attorney, made and delivered his report and opinion upon the record made before him to the Rent Director for the New York City Defense Area with whom such report and opinion was required to be filed. Said report, consisting also of an analysis of the testimony taken before him, the exhibits and all other papers relating thereto were, together with such testimony, exhibits and all other papers, presented to and considered by Walter M. Hort, said Area Rent Director of New York City Defense Rental Area, and by Leo F. Gentner, Acting Regional Administrator for the Office of Price Administra-[fol. 10] tion, Region II, and the same have all been forwarded to and filed with, and are now in the Office of the "Administrator" at Washington, D. C., and the complainants request that all of said papers, testimony, reports, opinions and exhibits be filed with the Clerk of this Court by the "Administrator" inasmuch as the same were considered by him when he made his order of Septeniber 28, 1945, protested by the complainants as aforementioned.

13. That the said report of Ira A. Schiller, Chief Branch Attorney, directed to said Walter M. Hort, Area Rent Director, New York City Defense-Rental Area, resulted in his

order dated, issued and effective on August 31, 1945, denying the applications aforesaid of the purchasers of the capital stock of said 55 Corporation, for certificates of eviction, which order was, as aforesaid, affirmed and confirmed by the Acting Regional Administrator (Region II), by order dated, issued and effective on September 7, 1945.

14. The "Administrator", by his order issued and effective on November 2, 1945, dismissed the protest aforementioned filed with him by the complainants, upon the ground that Section 203-A of the Emergency Price Control Act of 1942, as amended, provides that only persons subject to a regulation or order may file protests thereto with the "Administrator", and that since the Rent Regulations and Orders issued by the "Administrator" or his representatives prohibit or require action only by landlords or their agents, only such persons and not tenants are subject to such regulations and orders within the meaning of the Act aforementioned, and that the Revised Procedural Regulation, #3, issued pursuant to the authority granted in said section of the Act, makes no provision for the filing of a protest by a tenant, and that accordingly the protest filed by the complainants does not conform in a substantial [fol. 11] respect to the requirements of said Regulation, within the meaning of Section 1300.220 of said Regulation.

15. The complainants have been aggrieved by the dismissal of their protest by the "Administrator", in that Section 203-A of the Emergency Price Control Act of 1942, as amended, provides that at any time after the issuance of any regulation or order under Section 2 of the said Emergency Price Control Act, or in case of a price schedule at any time after the effective date thereof, specified in Section 206 thereof, any person subject to any provision of such regulation, order or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provisions and affidavits or other written evidence in support of said objections, and Section 204 of the Emergency Control Act provides that any person who is aggrieved by the denial or partial denial of his protest may, within 30 days after such denial, file a complaint with the Emergency Court of Appeals specifying his objections and praying that the regulation, order or price schedule protested be enjoined and set aside in whole or in part, and said Emergency Price Con-

trol Act of 1942; further provides that the said Emergency Court of Appeals may set aside such order or price schedule, which is not in accordance with law or is arbitrary or capricious.

16. The complainants claim and allege that they are persons who, in accordance with Section 203-A of the Emergency Price Control Act, are subject to the order of the "Administrator" and particularly of the order made and issued by him and effective on September 28, 1945, authorizing the "purchasers" of the capital stock of said 55 Corporation aforementioned to pursue their remedies in the local courts for the eviction of the complainants from their apartments in said premises and that they are seriously [fol. 12] affected by such order and necessarily subject thereto, for its effect is to authorize their eviction from their homes, to prevent which, among other things, the Emergency Price Control Act was enacted by Congress. Said complainants further contend and allege that any Rent Regulations and Orders of the Office of Price Administration, which seek to prevent the filing of protests by them and their right to review any order thereon by the "Administrator" are inconsistent with and in contravention of the provisions of the Emergency Price Control Act of 1942, as amended, and are void and of no effect, and that under the provisions of said Emergency Price Control Act, they were authorized to and had the right to file their protest with the "Administrator" for the reason, among others, that they were subject to the order made by him and were parties to all of the proceedings before the Rent Director and the Acting Regional Administrator aforementioned, and the order of the "Administrator" in reversing the Rent Director and the Regional Administrator, permits and subjects them to the commencement in the local courts of proceedings for their eviction from the apartments occupied by them in the premises aforesaid.

17. The complainants are further aggrieved by the dismissal of their profest by the "Administrator" and by his order of Sept. 28, 1945, for the additional reasons following which are also set forth in their protest aforementioned filed with the "Administrator" on October 10, 1945 and also relied upon by the complainants herein, namely:

(a) The "purchasers" who sought the aforementioned certificates of eviction failed to comply with Sec-

tion 6(b) (2) of the Rent Regulation for Housing in the New York City Defense Area, and in each individual case paid in cash less than the proportionate share of the 20% of the stock purchase price required to be paid in good faith under the Section aforementioned, in that the "purchasers" of the stock of the owning corporation, under said Regulation, were required to pay the [fol. 13] proportionate part of 20% in cash of the purchase price at the time of purchase, which purchase price would include the amount of the underlying obligations of the owning corporation, attributable to each apartment respectively at the time of the stock purchase, and that in all of the purchases here involved, the purchase of the stock was completed by payment and notice of acceptance sent to the "purchasers" no later than May 29, 1945. Although prior to the filing of the petitions seeking certificates of eviction, the liens or underlying obligations were reduced, the mortgage indebtedness existing against the property here involved, on May 29, 1945, the date of the purchases, consisted of a first mortgage in the principal amount of $1,683,000.08, plus accrued interest of $4,207.50, totaling $1,687,207.58; and a mortgage in the principal amount of $12,000 plus accrued interest of $65 totaling $12,065, and altogether the mortgage indebtedness with accrued interest, aggregated $1,699,272.58 at the time of the stock purchase.

Applying the formula adopted under the regulations of the Office of Price Administration in testing the 20% payment required by Section 6(b)(2), a copy of which is annexed to the said protest filed by the complainants, for all purposes to be considered a part hereof when filed in this court by the "Administrator" as herein requested, the "purchasers" failed to pay 20% in cash as required by Section 6(b)(2) at the time of purchase, and such failure of compliance is to the extent of 7.28% of the purchase price, all of which also appears under the First Finding of Fact, set forth in the report of Ira A. Schiller, Chief Branch Attorney, also annexed to said protest. The "Administrator's" finding and opinion as set forth in his opinion of September 28, 1945, that the date of the application for certificates of eviction is the determinative date as to the [fol. 14] underlying encumbrances upon the property and

the amount of cash required to be paid under the regulations of the Office of Price Administration, is clearly erroneous. The determinative date has always been and still is the date of the purchase, as appears by the form "G-9B (4/45)" of the Office of Price Administration, a copy of which is annexed to said protest filed by the complainants.

The opinion of the "Administrator", dated and issued September 28, 1945, also refers to the fact that the shares of stock of the owning corporation had been sold to the "purchasers" on May 29, 1945, for the sum of $389,300, and that *then* the "purchasers" became entitled to the issuance to them of 38.93 shares of the capital stock of the corporation, and on that date, when the purchase had been effected and the "purchasers" were entitled to their share of stock, the amount of the mortgages upon the property, with accrued interest, aggregated $1,699,272.58, which complainants contend indicates that the determinative date for determining the amount of the encumbrances was May 29, 1945 and not as concluded by the "Administrator".

The finding in the said opinion accompanying the "Administrator's" order granting protest, dated September 28, 1945, with reference to the compliance by the "purchasers" aforementioned of Section 6(b)(2) of the Rent Regulation is therefore clearly contrary to such Regulation and to the record made before the Chief Branch Attorney, to which reference is again made.

(b) Messrs. Earle and Carver, who were the sponsors of the plan for a cooperative, and their agents, Earle & Calhoun, were not prejudiced by any delay in the issuing of the interpretive letter of March 23, 1945, for the reason [fol. 15] that it appears from the record made, the exhibits and all other papers and documents forming part of the record herein, as submitted by Ira A. Schiller, Chief Branch Attorney, upon which the order of Walter M. Hort, Area Rent Director was based, and the order of the Acting Regional Administrator, was founded, and now on file with the "Administrator" that there was no prejudice or delay resulting from any alleged delay in the issuing of the letter of interpretation on March 23, 1945, for the sponsors of the plan had actively proceeded with the promulgation of the plan and were actively soliciting purchasers in the

meantime, and any delay in issuing the interpretive letter had no prejudicial effect upon promulgating and consummating the plan, as appears by such record made aforementioned, and as set forth in the report of said Ira A. Schiller, Chief Branch Attorney, under his Second Finding of Fact, where references to the stenographer's minutes before him and documents are made, which said report, including the said Second Finding of Fact, is annexed to the protest filed by the complainants herein and on file with the "Administrator."

(c) The said letter of interpretation of March 23, 1945, was unjustified, uncalled for, unwarranted and was secured without basis in fact or in law, or in the Regulations of the Office of Price Administration, and only as a result of the intervention of one Arthur D. Koppel, an officer of the Metropolitan Fair Rent Committee, a voluntary organization of property owners looking after their own interests and not of tenants for whose benefit, among others, the Congressional legislation aforementioned was enacted and the Office of Price Administration was constituted, all of which appears from the record made and the report of Ira [fol. 16] A. Schiller, Chief Branch Attorney. The order and opinion of the "Administrator", based upon said letter of interpretation is likewise without warrant, authority and validity, in that such letter of interpretation should not have been issued and the sponsors of the plan should have been required to comply with the Regulations of the Office of Price Administration in effect on and after February 17, 1945. The alleged facts presented to the "Administrator" upon which such letter of interpretation was granted did not establish any hardship nor come within the provisions as to hardship of the Regulations of the Office of Price Administration.

(d) The facts and documents submitted by Earle and Carver and the sponsors of the plan for the cooperative, to the Office of Price Administration, seeking the letter of interpretation as to hardship, contained misrepresentations and was a fraud upon the "Administrator" in that statements were contained in the said affidavits of Victor M. Earle, that 36 non-tenants of the premises aforementioned were definitely interested in the purchase of an apartment in said premises prior to February 1, 1945, which statement was false and untrue, and the further statement

contained therein, that 29 tenants in the building were definitely interested in the purchase of an apartment prior to February 1st, 1945 was likewise false and untrue, as well as the statement that on February 20, 1945, there were 24 tenants in the building very much interested in the purchase of apartments. Such statements were made to the "Administrator" and his subordinates to induce the issuance of the letter of interpretation of March 23, 1945, and as a result of the falsity thereof, the letter of March 23, 1945 should have been disregarded and considered void and of no effect and fraudulently obtained. The evidence, documents [fol. 17] and papers, showing such fraud and misrepresentation are on file in the office of the "Administrator", and are all fully analyzed and set forth under the Third Finding of Fact in the report of said Ira A. Schiller, Chief Branch Attorney, which said report, including the said Third Finding of Fact is annexed to the protest filed by complainants herein with the "Administrator". The fact that such misrepresentation was made and such fraud practiced, also appears from the opinion of the "Administrator", dated September 28, 1945, aforementioned, where he refers to the evidence as to hardship, submitted to the Office of Price Administration by the sponsors of the plan, to induce the issuance of the letter of interpretation and where he states that he examined with care the evidence adduced for the purpose of showing that the letter of March 23rd was obtained through fraud and misrepresentation, and that although there is some variation between the representations of Earle and the facts, it does not disclose that the letter of March 23rd was obtained through fraud and misrepresentation. The complainants contend and allege that if Victor M. Earle, as set forth in the opinion of the "Administrator", varied from the fact in his affidavits submitted to the "Administrator" to induce him to issue the letter of interpretation, that such conduct is misrepresentation and fraud, for if there was a variance from the fact, as found by the "Administrator", the true known facts were not presented, and that constitutes misrepresentation and fraud, and the letter of interpretation should therefore not have been permitted to remain in effect.

(e) The owning corporation is not a cooperative corporation or association as defined by the Co-Operative

Corporation Laws of the State of New York and therefore [fol. 18] does not come within the provisions of the laws and regulations of the Office of Price Administration as to eviction of tenants of co-operative apartments of a building owned by a cooperative corporation or association.

(f) The sponsors of the plan and the owners of the stock sold to the "purchasers", throughout the proceedings here involved, acted in bad faith, in that they knew that the property owned by the owning corporation had no equity over and above its underlying encumbrances and were seeking to sell to the complainants, who were tenants thereof, and the public, the shares of stock of the owning corporation at a sum which resulted in the receipt by them of the sum of about $390,000, though the shares of stock of said corporation, sought to be sold, were worthless, there was no equity in the property, and the plan for the sale of said shares of stock, upon the price aforementioned, was fraudulent and based upon bad faith, misrepresentation and a scheme to obtain a large sum of money as the result of the sale of apartments in the property involved, in which there was no equity over and above the underlying encumbrances. There was further bad faith on the part of Victor M. Earle, one of the owners of said stock, in that he used the shares of stock of the owning corporation which he had agreed to sell to the "purchasers" aforementioned, and who had paid for the same, in order to enable him and his son to obtain proprietary leases to consummate the plan aforesaid, although the shares of stock had been sold and paid for by such "purchases" on or before May 29, 1945. Said Victor M. Earle used such shares of stock and applied the same to his own personal use, by depositing the shares with the Chase National Bank of New York City, as collateral security for a loan to himself from said bank [fol. 19] of $40,000, which he used, together with $1200 obtained from his wife, to acquire such proprietary leases, all of which appears in the report of Ira A. Schiller, Chief Branch Attorney, under his "Recommendations and Reasons Therefor", annexed to the protest filed by complainants herein with the "Administrator", to which reference is hereby made. Further bad faith is shown, as set forth in the "Analysis of the Evidence Taken", as aforementioned, in the report of said Ira A. Schiller, wherein it appears that said Victor M. Earle, one of the sponsors of

the plan and holder of shares of stock of the owning corporation which were sold to the said "purchasers", attempted to prevent certain important witnesses from attending the hearing before him and giving their evidence, by communicating with them while the hearings were pending, which said witnesses were persons whose names appeared upon the affidavits submitted by him to the Office of Price Administration, to induce the issuance of the letter of interpretation aforesaid.

(h) That the entire course of conduct of the "Administrator" and his subordinates, with relation to the issuance of the letter of interpretation aforementioned as well as the orders of the "Administrator", effective on September 28, 1945 and November 2, 1945, directed to said "purchasers" as aforementioned, permitting them to seek their remedy in the local courts for the eviction of the complainants from the apartments in the premises aforesaid, occupied by them, and dismissing the protests filed by the complainants, was and is without justification, warrant, authority or basis in fact, and was and is unfair, unreasonable, arbitrary, inequitable and capricious and not in accordance with law.

18. The following is a statement of the relief requested by the complainants:

[fol. 20] (a) That the order of the "Administrator" dated and effective November 2, 1945, dismissing the protest filed with him by the complainants on October 10, 1945, be enjoined, set aside and annulled;

(b) That the order of the Administrator, dated and effective September 28, 1945, authorizing the "purchasers" to pursue their legal remedies in the local courts for the eviction of the complainants from their apartments in 55 Central Park West, New York City, be in all things enjoined, set aside and annulled;

(c) That the orders of the Rent Director, dated and effective on August 31, 1945, and the order of the Acting Regional Administrator, dated and effective on September 7, 1945, denying the applications of the "purchasers" for certificates authorizing them to commence proceedings in the local courts for the evic-

tion of the complainants from their apartments in 55 Central Park West, New York City, be reinstated and in effect.

(d) That the complainants have such other and further relief as to the Court may seem just and proper.

Alexander Pfeiffer, of the firm of Pfeiffer & Crames,
Attorneys for Complainants.

New York, N. Y. November 14, 1945.

All papers may be served upon: Alexander Pfeiffer, of the firm of Pfeiffer & Crames, 551 Fifth Avenue, New York 17, N. Y.

[fol. 21] [Stamp:] United States Emergency Court of Appeals. Filed Dec. 1, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, ISIDOR M. SAKS, MELVIN CAPLAN, DAVID WERTH, C. Clarence Kaskel, Morton H. Baron, Robert Herrmann, Samuel Ogus, Charles Maslow, George Willett, Harry Wiener, Charles Goldman, David Rudberg, William I. Holmauser and Sydney Maybaum, Complainants,

against

CHESTER BOWLES, Price Administrator, Respondent

SIRS:

Please Take Notice that on the annexed affidavit of Louis L. Tetelman, sworn to the 29th day of November, 1945, and on all proceedings heretofore had herein, the undersigned will move this Court on the 5th day of December, 1945, at Fifth and E Streets, N. W., Washington, D. C., by the submission of the within papers on said date, for an order permitting the purchasers named in paragraph marked "5" of the complaint to intervene as parties in interest, and for such other and further relief as to the Court may be meet and proper.

Dated: New York, November 29, 1945.

Yours, &c., Louis L. Tetelman, of the Firm of Tetelman & Tetelman, Attorneys for Purchasers named in paragraph marked "5" of the complaint, Office & P. O. Address, 1450 Broadway, New York 18, N. Y.

To: Alexander Pfeiffer, Esq., of the Firm of Pfeiffer & Crames, Attorneys for Complainants, Office & P. O. Address, 551 Fifth Avenue, New York 17, N. Y.; Administrator of the Office of Price Administration, Washington, D. C.

[fol. 22] UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, ISIDOR M. SAKS, MELVIN CAPLAN, DAVID WERTH, C. Clarence Kaskel, Morton H. Baron, Robert Herrmann, Samuel Ogus, Charles Maslow, George Willett, Harry Wiener, Charles Goldman, David Rudberg, William I. Hohauser and Sydney Maybaum, Complainants,

against

CHESTER BOWLES, Price Administrator, Respondent

STATE OF NEW YORK,
County of New York,
City of New York, ss:

Louis L. Tetelman being duly sworn, deposes and says:

I am an attorney and counselor at law and a member of the firm of Tetelman & Tetelman, located at 1450 Broadway, New York 18, N. Y.

I am a member of the Bar of the above named Court, having been admitted to practice as an attorney at law on the 28th day of November, 1945.

I am counsel for all of the purchasers named in paragraph marked "5" of the complaint, dated November 14, 1945, filed herein.

With the filing of the original applications for certificates relating to eviction in the local Office of the New York City Defense Rental Area, and thereafter during the proceedings before the hearing officer in said office, and upon the filing of the petition for review in the Office of the Regional Administrator for the Office of Price Administration, and upon the filing of the protest of the applicants with the Office of Price Administration in Washington, D. C., [fol. 23] I have acted as counsel for all of said applicants named as purchasers in paragraph marked "5" of the complaint. I am fully and completely acquainted with all of the facts and circumstances in the above entitled matter.

All of said purchasers named in paragraph marked "5" of the complaint are directly interested in and concerned about the certificates now outstanding permitting them to invoke the local law to evict the complainants. Three of the purchasers have instituted proceedings in the local Court to evict the tenants occupying their apartments and the others intend to institute their proceedings on or after

December 14, 1945, as permitted by the certificates relating to eviction.

I am of the opinion that with the issuance of the order in effect September 28, 1945, by the Administrator of the Office of Price Administration, the question of the issuance of certificates relating to eviction was finally determined and consequently the complainants are without authority or right to file a complaint in this Court and this Court has no jurisdiction.

It is, therefore, respectfully requested that the purchasers named in paragraph marked "5" of the complaint be permitted to intervene.

Louis L. Tetelman.

Sworn to before me this 29th day of November, 1945. Lillian Keisler, Commissioner of Deeds. N. Y. Co. Clk. No. 83, Reg. No. 5-K-37. Kings Co. Clk. No. 30, Reg. No. 5-K-30. Bronx Co. Clk. No. 15, Reg. No. 5-K-21. Commission expires December 28, 1945.

[fol. 24] [Stamp:] United States Emergency Court of Appeals. Filed Dec. 3, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, et al.,

v.

CHESTER BOWLES, Price Administrator

MOTION OF ADMINISTRATOR TO DISMISS COMPLAINT

Now comes Chester Bowles, Price Administrator of the Office of Price Administration, Respondent, by his duly authorized attorney, and, pursuant to Rule 13 of the Rules of this Court, moves to dismiss the complaint filed herein on the ground that Complainants have no standing to invoke the jurisdiction of the Court.

The accompanying memorandum sets forth the basis of this motion and the argument in support thereof.

Respectfully submitted, Richard H. Field, General Counsel.

[fol. 25] [Stamp:] United States Emergency Court of Appeals. Filed Dec. 3, 1945, Herman C. Beasley, Clerk.

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, et al.

v.

CHESTER BOWLES, Price Administrator

MEMORANDUM IN SUPPORT OF MOTION OF ADMINISTRATION TO DISMISS COMPLAINT

Statement of Facts

On June 14, 1945, David Gordon and twenty-four other purchasers of stock in the 55 Corporation, a New York Corporation, filed petition for certificates of eviction pursuant to Section 6(b) (2)[1] of the Rent Regulation for Housing in the New York City Defense-Rental Area, authorizing them to proceed under local law to evict Complainants from certain apartments located in the building at 55 Central Park West, New York City. These twenty-five petitioners had purchased capital stock of the 55 Corporation under a share-ownership plan entered into between themselves and the former owners of all the capital stock of the corporation, under which the petitioners became entitled, by reason of their acquisition of such stock, to proprietary [fol. 26] leases covering certain apartments in the premises owned by the corporation. The petitioners, stock purchasers, were thus seeking possession of those apartments

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[1] Section 6(b)(2) provides:

* * * *Occupancy by purchasers.* A certificate shall be issued authorizing the pursuit of local remedies to remove or evict a tenant of the vendor, for occupancy by a purchaser who has acquired his rights in the housing accommodations on or after November 1, 1943, only as provided in this paragraph (b)(2) * * *.

[2] 8 F. R. 13914.

covered by their proprietary leases in filing their petitions for certificates relating to eviction.[3]

On August 31, 1945 the Rent Director for the New York City Defense-Rental Area issued several orders denying the petitions for certificates of eviction. On September 4, 1945 the petitioners filed applications for review of the Rent Director's orders with the Regional Administrator of the Office of Price Administration for Region II, and on September 7, 1945 the Regional Administrator consolidated and denied the applications for review.

On September 7, 1945 the petitioners filed a protest with the Administrator against the denial of their applications for review. This protest was docketed as "In the Matter of David Gordon, et al., Docket No. RPA-II-425-P." On September 28, 1945 the Administrator issued two orders, with an accompanying opinion,[4] granting the protest, and authorizing the petitioners on and after December 14, 1945 to pursue their remedies at local law to evict the existing tenants of the apartments for which the petitioners possess proprietary leases.[5]

[fol. 27] On October 10 and 25, 1945, David Werth and fourteen other existing tenants, and Mildred S. Strauss, likewise an existing tenant, filed protests against the orders issued by the Administrator on September 28, 1945 authorizing the petitioners to pursue their remedies at local law to evict these existing tenants. These protests were docketed as "In the Matter of David Werth, et al., Docket No. RPA-II-446-P," and "In the Matter of Mildred S. Strauss, Docket No. RPA-II-458-P," respectively. On November 2, 1945 the Administrator issued an order consolidating

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[3] Section 6(b)(3) of the Regulation, added by Amendment 17, effective February 17, 1945 provides that no certificates of eviction shall be issued for occupancy by purchasers of stock in a cooperative, with certain stated exceptions. If a petitioner is seeking a certificate under one of these exceptions, he files and the certificate is issued pursuant to Section 6(b)(2). The instant petitioners, who filed under the exceptions specified in Section 6(b)(3), therefore sought certificates under Section 6()(2) of the Regulation.

[4] 3 Opinions & Decisions (OPA) p. 3301.

[5] Three petitioners were authorized to pursue their remedies at local law on or after October 1, 1945.

and dismissing these two protests, pursuant to Section 203(a) of the Emergency Price Control Act of 1942, as amended, and Section 1300.200 of Revised Procedural Regulation No. 3, issued thereunder, on the ground that they did not comply with the provisions of the statute and regulation since Complainants, being tenants, were not "subject to" any provision of the orders which they sought to protest. The Complaint in this case has been filed by the fifteen tenants who filed the protest docketed as "In the Matter of David Werth, et al., Docket No. RPA-II-446-P."

Argument

Since Complainants were not "subject to" the provisions of the orders of September 28, 1945 authorizing the petitioners to pursue their remedies at local law, because the orders neither required nor prohibited action on the part of Complainants, the protests were properly dismissed.

Section 203(a) of the statute provides that "any person subject to" a provision of a regulation or order issued under section 2 may file a protest against such provision. [fol. 28] In accordance with the clear indication from the legislative history of the statute,[6] the Administrator has consistently construed this phrase as applying generally to persons of whom action was prohibited or required by a particular provision of a regulation or order.[7] This con-

[6] Sen. Rep. No. 931, 77th Cong. 2d Sess. (1942) 22: "Section 203(a) is designed to provide the advantages of a hearing, in a manner consistent with the need for expeditious determinations, to all persons who are required to obey the provisions of regulations or orders under section 2."

[7] Procedural Regulation No. 1, 7 F. R. 971, Feb. 13, 1942; Procedural Regulation No. 3, 7 F. R. 3936, May 25, 1942; *Matter of James B. Wigdor*, Docket No. RPA-II-135-P, decided August 19, 1944; Memorandum in support of Motion of Administrator to dismiss complaint in *J. H. Whitten, tenant* v. *Bowles, Price Administrator*, and *W. J. Folsom, landlord*, (E. C. A.) No. 107; *Matter of Beatrice A. Perew*, Docket No. RPA-II-9-P, decided August 3, 1943; *Matter of Mrs. W. O. Cooper*, Docket No. RPA-V-90-P, decided October 8, 1945; *Matter of Wm. M. and Mary Raines*, Docket No. RPA-V-89-P, decided September 13, 1945.

temporaneous administrative interpretation of the statute contained in Procedural Regulation No. 1[8] has already been approved by this Court as reasonable. *Buka Coal Company* v. *Brown*, 133 F. (2d) 949 (E. C. A., 1943).

Revised Procedural Regulation No. 3[9] provides, as did [fol. 29] Procedural Regulation No. 3,[10] for the filing of a protest only by landlords of whom action is prohibited or required. This interpretation of the phrase "person subject to" for purposes of rent regulations and orders is consistent with that approved in the *Buka* case. It is based on the fact that rent regulations and orders neither prohibit nor require action on the part of tenants. For example, while the Rent Regulation prescribes maximum rents, tenants may, without legal sanction against them, pay a lesser or greater rental. Likewise, orders increasing or decreasing maximum rents do not prohibit or require action on the part of tenants, since they merely prescribe maximum rents which the landlord is legally entitled to receive *if* he can arrive at a bargain with a tenant for that rental. Similarly, the issuance of a certificate of eviction, as in this case, does not prohibit or require any action on the part of

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[8] The only exception recognized by the Administrator has been in the case of a producer of an agricultural commodity who complains that a particular price regulation violates section 3 of the Emergency Price Control Act or the Stabilization Act—sections designed to protect such producers against the depressing effect upon their prices of the processors' ceilings. Sec. 24 of Revised Procedural Regulation No. 1 provides in part as follows: "* * * Provided, however, That a producer of an agricultural commodity shall be considered to be subject to a maximum price regulation for the purpose of asserting any right created by section 3(a) of the Emergency Price Control Act of 1942 or section 3 of the Act of October 2, 1942 (Pub. Law 729, 77th Cong.) for the benefit of producers of such an agricultural commodity. Any protest filed by a person not subject to the provision protested, or otherwise not in accordance with this revised procedural regulation, may be dismissed by the Administrator."

[9] Section 1300.216.

[10] 7 F. R. 3936.

a tenant, but merely authorizes a landlord to pursue his remedies at local law.

In the instant case, the orders issued by the Administrator on September 28, 1945, authorizing the petitioners to pursue their remedies for eviction in accordance with local law, did not operate to evict the Complainant-tenants, but merely left them in the same position in which they would have been had the regulation contained no provision requiring the petitioners to obtain a certificate before pursuing local remedies for eviction. It is therefore manifest that the authorization to the petitioners did not forbid or require any action on the part of Complainants. Nor is there anything in the statute to indicate that special legal rights [fol. 30] were intended to be inferred upon tenants generally or in this particular situation. Since Complainants are not "subject to" the provisions of the orders in question, their protest against such orders was properly dismissed.

For the reasons given above the complaint should be dismissed.

Respectfully submitted, Richard H. Field, General Counsel.

[fol. 31] [Stamp:] United States Emergency Court of Appeals. Filed Dec. 6, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, et al.,

v.

CHESTER BOWLES, Price Administrator.

Now come Jack Parker, et al., by their duly authorized attorney, Alexander Pfeiffer, of Pfeiffer & Cranes, and move to extend the complainants' time to file an answer to the motion of Chester Bowles, Administrator of the Office of Price Administration, pursuant to Rule 13 of the Rules of this Court, to dismiss the complaint.

The annexed affidavit sets forth the reason for this application.

Dated: New York, December 3, 1945.

Respectfully submitted, Alexander Pfeiffer of the firm of Pfeiffer & Crames, Attorneys for the Moving Parties Herein, Office & Post Office Address: 551 Fifth Avenue, New York 17, N. Y.

[fol. 32] IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, et al.,

v.

CHESTER BOWLES, Price Administrator

STATE OF NEW YORK,
County of New York, ss:

Charles N. Wald, being duly sworn, deposes and says: I am a member of the firm of Pfeiffer & Crames and make this affidavit in support of the annexed motion.

Since Tuesday, November 28th, 1945, Mr. Alexander Pfeiffer, the attorney for the complainants herein, has been confined to his home in bed, suffering from virus pneumonia. He is now being attended by day and night nurses, and his physicians, Dr. N. W. Stark and Dr. George Baehr, have refused permission to discuss any office matters with him. It is not expected that Mr. Pfeiffer's condition will permit him to leave his bed at home for at least two weeks from date.

In the meantime, on December 4, 1945, at about 1 P. M., this office was in receipt of a copy of the motion of the Price Administrator to dismiss the complaint, pursuant to Rule 13 of the Rules of this Court. In accordance with the rules of this Court, the complainants have five days' time within which to file an answer to the said motion. Since the motion was served by mail, said complainants would have three additional days, or a total of eight days.

In view of the foregoing statement, it is obvious that no adequate answer can be submitted within the time limited by the rules. Mr. Pfeiffer has been handling this matter

personally from its inception and is the only one who is thoroughly familiar with it.

In consequence of the foregoing, I communicated with Mr. Hyman, the attorney in charge of the Office of Price Administration, at Washington, D. C., who is in charge of this matter and advised him of the situation. Said attorney [fol. 33] stated that he would have no objection to an extension of three weeks within which the complainants may file their answer to the Price Administrator's motion to dismiss.

Wherefore, I respectfully request that the time of the complainants to file an answer to the Price Administrator's motion to dismiss be extended for a period of three weeks from the present expiration date.

Charles H. Wald.

Sworn to before me this 5th day of December, 1945. Rose Hoffpauir, Commissioner of Deeds, N. Y. C., New York Co. Clk's. No. 25, Reg. No. 7-H-22. Commission Expires March 13, 1947.

[fol. 34] [Stamp:] United States Emergency Court of Appeals. Filed Dec. 6, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, et al.,

v.

CHESTER BOWLES, Price Administrator

ORDER

Upon consideration of Complainants' motion for enlargement of time until January 2, 1946, to file an answer to the Respondent's motion to dismiss the complaint herein, and counsel for Respondent having stated that he has no objection thereto,

It is Ordered that Complainants' motion be, and it hereby is, granted.

By the Chief Judge.

Teste: Herman C. Beasley, Clerk.

December 6, 1945.

[fol. 35] [Stamp:] United States Emergency Court of Appeals. Filed Dec. 7, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, ISIDOR M. SAKS, MELVIN CAPLAN, DAVID WERTH, C. Clarence Kaskel, Morton H. Baron, Robert Herrmann, Samuel Ogus, Charles Maslow, George Willett, Harry Wiener, Charles Goldman, David Rudberg, William I. Hohauser and Sydney Maybaum, Complainants,

against

CHESTER BOWLES, Price Administrator, Respondent

The complainants, by their attorneys, Pfeiffer & Cramer, object to the petition to intervene herein, dated November 29, 1945, and filed with the Clerk of this Court on December 1, 1945, upon the following grounds:

1. The United States Emergency Court of Appeals is a statutory Court, which functions in accordance with its duly adopted rules, and there is nothing in the rules of said Court which authorizes this application on the part of the purchasers named in Paragraph "5" of the complaint, to intervene in said action.

2. Said application is for leave to intervene, not as amicus curiae, but as parties in interest, when in fact said purchasers are not parties in interest, the dispute existing between the complainants, on the one hand, and the Price Administrator of the Office of Price Administration, on the other.

3. The action is brought by the complainants, against whom an alleged prejudicial order was made by the Price Administrator of the Office of Price Administration, and is brought against the Price Administrator, who made said alleged prejudicial ruling. Such an action is brought in conformity with the provisions of the United States Emergency Price Control Act and with the rules of this Court. It is not provided either in the Emergency Price Control Act or in the rules of this Court that such an action must be [fol. 36] brought against parties like the purchasers herein,

who might be interested in the result. Had such been the intention, adequate provision could easily have been made for the joinder of such alelged interested parties.

4. If the purchasers herein were permitted, on their own application, to join the action as parties in interest, then in every similar proceeding various of the parties might seek to be joined as parties in interest, resulting in cumulative memoranda and argument and a far more ponderous procedure than the procedure specifically provided in the rules of this Court.

5. There is no reason or justification for the intervention of these parties, for, in any event, their interests are adequately protected by the Price Administrator. The Price Administrator is in a position to protect their interests, because he made the order upon a consideration of all of the proofs submitted by the complainants and said purchasers.

6. In the affidavit of Louis L. Tetelman, submitted in support of the application to intervene, Mr. Tetelman states that he is of the opinion that "the complainants are without authority or right to file a complaint in this Court, and this Court ha sno jurisdiction." If that is the basis for this application to intervene, then it is without force, because the Administrator of the Office of Price Administrator filed a motion with this Court on December 3, 1945, pursuant to Rule 13 of the Rules of this Court, to dismiss the complaint on the ground that the complainants have no standing to invoke the jurisdiction of the Court. So that, every question which has been raised by Mr. Tetelman has now been submitted to this Court for determination.

For all of the foregoing reasons, the complainants above named object to the application to intervene herein.

Dated, New York, December 4, 1945.

Alexander Pfeiffer, by C. H. Wald, Alexander Pfeiffer, of the firm of Pfeiffer & Cramer, Attorneys for Complainants, Office & P. O. Address: 551 Fifth Avenue, New York 17, N. Y.

[fols. 33-35] [File endorsement omitted.]

[fol. 36] IN THE UNITED STATES EMERGENCY COURT OF APPEALS

[Title omitted]

ANSWER TO MOTION OF ADMINISTRATOR TO DISMISS COMPLAINT—Filed December 29, 1945

Now come Complainants, Jack Parker, et al., by their duly authorized attorney, Alexander Pfeiffer, of Pfeiffer & Crames, and for their answer, pursuant to Rule 14 (b) of the Rules of this Court, to the motion of Chester Bowles, Administrator of the Office of Price Administration, to dismiss their complaint, pursuant to Rule 13, allege that they have the right to appeal to this Court, pursuant to Section 203 (a) and Section 204 (a) (Supplement IV United States Title 50, Section 924 (a)) of the Emergency Price Control Act of 1942, as amended.

The accompanying memorandum sets forth the basis of the opposition to this motion and the arguments in support thereof.

The Complainants request an oral argument of this motion to dismiss and will argue either in New York or Washington or any other place designated by this Court. [fol. 37] The points here involved have never heretofore been passed upon or decided and the Complainants are desirous of supplementing their memorandum with an oral argument particularly in view of the serious consequences to them if their complaint is dismissed.

Dated: New York, December 20, 1945.

Respectfully submitted, Alexander Pfeiffer, of the firm of Pfeiffer & Crames, Attorneys for the Complainants, 551 Fifth Avenue, New York 17, N. Y.

[fol. 38] IN THE UNITED STATES EMERGENCY COURT OF APPEALS

[Title omitted]

COMPLAINANTS' BRIEF IN OPPOSITION TO MOTION OF ADMINISTRATOR TO DISMISS COMPLAINT—Filed December 29, 1945

This motion is brought by the Price Administrator to dismiss the complaint of 25 tenants of apartments in premises known as 55 Central Park West, Manhattan, City of New York, who are appealing from orders of the Price Administrator issuing certificates relating to their eviction from their homes, based upon Section 6 (b) (2) of the New York City Rent Regulations for Housing, in favor of certain purchasers under an alleged cooperative ownership plan of the apartments occupied by the complainants, and the order of dismissal by the Price Administrator of the complainants' protest thereto.

The Administrator's motion proceeds upon the ground that the complainants, as tenants, are not subject to the orders of the Price Administrator issuing certificates relating to their eviction and dismissing their protests thereto and, therefore, have no right to appeal therefrom.

[fol. 39] Statement of Facts

The facts here set forth are to be found in the complaint in this court and the record of the proceedings before the Chief Branch Attorney of the New York City Defense Rental Area, and the opinions and orders of the Area Rent Director for the same area, the Acting Regional Administrator for the OPA Region II and the Price Administrator.

All paragraph numbers refer to the complaint herein.

The complainants are tenants of certain apartments located at 55 Central Park West, City of New York. Each of the complainants has spent large sums of money in decorating his respective apartment and each of them is ready, willing and able to pay the rent required to be paid for said apartment, and to comply with any and all rules and regulations of the City, State and Federal Governments having application thereto and to do whatever may be necessary and requisite to be permitted to remain in and occupy the same as his home and place of abode (par. 9).

On June 14, 1945 David Gordon and 24 other purchasers of stock in the Fifty-Five Corporation filed petitions for

certificates of eviction pursuant to Section 6 (b) (2) of the Rent Regulation of Housing in the New York City Defense Rental Area [1] authorizing them to proceed under local law [fol. 40] to evict the complainants herein from their apartments in the said premises. These 25 petitioners are alleged purchasers and holders of proprietary leases in and of the apartments occupied by the complainants under a cooperative ownership plan sponsored by Messrs. Earle and Carver, owners of the entire capital stock of the said Fifty-Five Corporation (par. 5).

Notwithstanding the tremendous shortage of apartments in the City of New York and the great emergency that has existed in the City of New York, and in fact, throughout the country, resulting in the passing of the Emergency Price Control Act in 1942, and the creation of the Office of Price Administration, Messrs. Earle and Carver sought to convert

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[1] Section 6 (b) (2) provides:

Occupancy by purchaser. A certificate shall be issued authorizing the pursuit of local remedies to remove or evict a tenant of the vendor, for occupancy by a purchaser who has acquired his rights in the housing accommodations on or after November 1, 1943, only as provided in this paragraph (b) (2).

(i) Where the Administrator finds that the payment or payments of principal made by the purchaser aggregate twenty per cent or more of the purchase price, he shall, on petition of either the vendor or purchaser, issue a certificate authorizing the vendor or purchaser to pursue his remedies for removal or eviction of the tenant in accordance with the requirements of the local law. Except as hereinafter provided, the certificate shall authorize pursuit of local remedies at the expiration of three months after the date of filing of the petition.

* * * * * * *

Any payments of principal made from funds borrowed for the purpose of making such payments shall be excluded in determining whether twenty per cent of the purchase price has been paid, unless the Administrator finds that the loan is made in good faith and not for the purpose of circumventing or evading the provisions of this paragraph (b) (2).

about 28 apartments into cooperatives by offering for sale shares of stock of said owning corporation which they held, to purchasers, including the purchasers herein, with proprietary leases, for a term of years, of the apartments involved. The purchase price for said apartments under said share ownership plan aggregated about $390,000 over and above the first mortgage of $1,500,000 (par. 11). The occupants of these apartments, including the complainants, refused to purchase their apartments at such an exorbitant price, by acquiring stock in the owning corporation, in face of the fact that Mr. Earle himself had sworn as recently as March of this year, in an attempt to reduce the tax assessed value of the property, that its value was no more than $1,000,000 (par. 11). Earle and Carver's plan had for its object a net return to them of about $381,000, which is virtually about the sum they collected from the sale of the apartments of the complainants and others, to the purchasers in connection with property in which Earle had previously sworn there was no equity (par. 11).

[fol. 41] While the cooperative was being organized and a few prospective purchasers were being contacted, Earle and Calhoun, real estate brokers, managing agents and realtors in the City of New York, acting for and in behalf of Earle and Carver and said owning corporation, wrote a letter to Maurice A. Whitebook, Chief Attorney for the New York City Defense Rental Area of the OPA on March 5, 1945, requesting an interpretation concerning the right of purchasers of cooperative apartments in 55 Central Park West, to obtain certificates of eviction under the provisions of Subdivision II of Section 6 (b) (3) of the Rent Regulations of the OPA, set forth in the complaint in this action (par. 12). Subdivision II of Section 6 (b) (3) provided that where the cooperative was organized on or after February 17, 1945, the effective date of this Regulation, no certificate of eviction shall be issued unless on such date stock in the cooperative had been purchased by persons who were then tenants of at least 80% of the apartments in the premises or unless on such date the cooperative was in the process of organization and the Administrator finds that substantial hardship would result from the failure to issue such a certificate.

Earle and Carver knowing that purchasers under their plan would not qualify under this provision, proceeded on the theory that substantial hardship would result to the

owners of the capital stock of the corporation if they were not permitted to proceed with the conversion of some of the apartments into cooperatives under the Regulations existing prior to February 17, 1945. To their letter there were attached certain affidavits and exhibits (par. 12). The facts contained in this letter, attached affidavits and exhibits were therafter found to be fraudulent by the Chief Branch Attorney of the New York City Defense Rental Area on the application of the purchasers and others for certificates relating to eviction of the complainants and others, as will be hereinafter shown. An alleged interpretation of hard-[fol. 42] ship was granted by the Office of Price Administration on March 23, 1945, permitting Earle and Carver to proceed with the share ownership plan under the regulations in existence prior to February 17, 1945, but which, as stated, had been changed on that date (par. 12). Thereafter the purchasers of the apartments involved herein applied for certificates of eviction from the Price Administrator, based on an alleged full compliance with Section 6 (b) (2) of the Rent Regulation for Housing in the City of New York (in effect prior to February 17, 1945), which requires, as stated above, that the purchasers of stock for the purpose of carrying out the cooperative ownership plan, must have paid 20% of the equity and the underlying obligation of the corporation, attributable to their apartments at the time of their stock purchase (par. 12).

The proceeding was referred to and came up before the Chief Branch Attorney of the New York City Defense Rental Area, who after taking about a thousand pages of testimony, submitted a report dated August 8, 1945, in which he found for the complainants herein on the ground, among others, that the purchasers did not fulfill the 20% payment required, as set forth in said Section 6 (b) (2) of the New York City Rent Regulation for Housing. (Pp. 4, 5, Report of Ira A. Schiller, Chief Branch Attorney.) Further, that the letter of interpretation as to hardship issued by the Administrator and interposed in the proceedings was based upon misrepresentations and fraudulent statements made by Earle and Calhoun who sought the interpretation in that they misrepresented their alleged delay in consummating "prospective deals" with "prospective buyers" until they procured the letter of interpretation and in that they further misrepresented as to tenants and others that they had claimed to have interested in the purchase of

apartments in the premises. (Pp. 7-12, Report of Ira A. Schiller, Chief Branch Attorney.) He also found that the sponsors of the plan were not prejudiced by any delay, as [fol. 43] they had strenuously argued, in issuing the interpretive letter of March 23, 1945. (Pp. 5-7, Report of Ira A. Schiller, Chief Branch Attorney.)

In recommending the denial of the applications of the purchasers, for certificates of eviction, the Chief Branch Attorney in his report (a part of the record filed with the Price Administrator), stated at page 12 as follows:

> "After a careful review of the entire record in this proceeding, I recommend that all the petitions herein be denied for the reasons that petitioners have not qualified under Section 6 (b) (2) of the Rent Regulation and that the exemption granted by the letter of interpretation was obtained by misrepresentations made to the Office of Price Administration in such substantial degree as to require a revocation thereof."

and further, at pages 12, 13:

> "The whole presentation of the share-ownership plan by the sponsors was permeated with the implication that this was a very substantial financial transaction involving important financial commitments on the part of the sponsors. The fact is that they had not a penny invested and were operating on an option in the final exercise of which they hypothecated the very shares of stock which had been sold to purchasers, after payment therefor had been made, for a loan of $40,000 from the Chase National Bank. This was done in order that the sponsors might buy three apartments, two in the name of Mr. Earle and one in the name of his son, none of which they intended to occupy; obviously, for the purpose of showing a greater number of sales than were actually consummated and to be able to assert compliance with the plan as submitted to OPA which called for the sale of no less than 30 apartments or 150 [fol. 44] rooms. No characterization of this loan is needed to present it in its true light."

These findings were confirmed by the Area Rent Director of the City of New York, by order made by him, and thereafter confirmed by the Acting Regional Administrator of

the OPA for Region II. In his opinion, the Acting Regional Administrator stated that purchasers had not complied with the provisions of Subdivision II of Section 6 (b) (3) of the Rent Regulation of the OPA, which required that certificates relating to eviction should only be issued if 80% of the tenants in occupancy at the time of the issuance of the certificates became purchasers of their apartments (p. 1, Order and Opinion of Leo F. Gentner, Acting Regional Administrator for Region II). He also denied the claim that purchasers were entitled to these certificates under the "hardship" provision of Subdivison II of Section 6 (b) (3) in accordance with the letter of interpretation of Maurice R. Whitebook, and sustained the findings of fraud and misrepresentation in the procurement of the letter of interpretation (p. 1). He concluded his opinion with the statement that "evictions of this character are inconsistent with provisions of the Emergency Price Control Act as amended" (p. 1). Subsequently the purchasers protested this order to the Price Administrator and the Chief Branch Attorney, the Area Rent Director and the Acting Regional Administrator, were reversed by him, and certificates or orders authorizing the purchasers to pursue their local remedies to evict the complainants from their apartments were issued (par. 6).

Complainants thereupon filed a notice of protest with the Administrator based upon the following grounds as set forth in the complaint herein at paragraph 17:

> (a) That the purchasers failed to comply with Section 6 (b) (2) of the Rent Regulation, and in each individual case paid in cash less than the proportionate [fol. 45] share of the 20% of the stock purchase price required to be paid in good faith under the Section aforementioned.
>
> (b) That Messrs. Earle and Carver, sponsors of the plan for a cooperative, and their agents Earle & Calhoun, were not prejudiced by any delay in the issuing of the interpretive letter of March 23, 1945.
>
> (c) That said letter of interpretation of March 23, 1945, was unjustified, uncalled for, unwarranted and was secured without basis in fact or in law, or in the Regulations of the OPA.

(d) The facts and documents submitted by Earle and Carver to the OPA seeking a letter of interpretation as to hardship, contained certain material misrepresentations and was a fraud upon the Administrator.

(e) That the owning corporation is not a cooperative corporation or association as defined by the Cooperative Corporation Laws of the State of New York and therefore does not come within the provisions of the laws and regulations of the Office of Price Administration as to eviction of tenants of cooperative apartments of a building owned by a cooperative corporation or association.

(f) The sponsers of the plan acted in bad faith throughout the proceedings involved herein, in that they knew that the property owned by the owning corporation had no equity over and above its underlying encumbrances and were motivated solely by the desire to obtain a profit of about $390,000 on the shares of stock of said corporation sought to be sold were worthless,—there was no equity in the property, and the plan for the sale of said shares of stock upon the [fol. 46] price aforementioned was fraudulent and based upon bad faith and misrepresentation.

(g) That the entire course of conduct of the Administrator and his subordinates in issuing the letter of interpretation and the certificates of eviction, was without justification, warrant, authority, or basis in law or in fact.

Pending the decision of the Price Administrator upon the complainants' protest, the purchasers commenced summary proceedings in the Municipal Court, Borough of Manhattan, City of New York, to evict the complainants from their homes which proceedings are now pending in that Court.

Opinion of the Price Administrator Dismissing Complainants' Protest

Complainants' protest, filed with the Price Administrator, was dismissed by him on November 2, 1945, on the ground that the complainants had no standing to protest since Section 203 (a) (50 U. S. C. A. Sec. 923 (a)) of the

Emergency Price Control Act of 1942, as amended, provides that only persons "subject to" a regulation or order may file a protest thereto with the Administrator and that since the rent regulations issued by the Administrator or his representatives prohibit or require action only by landlords, only such persons, and not tenants, are subject to the regulations and orders within the meaning of the Act, and further, that his Revised Procedural Regulation No. 3, allegedly issued pursuant to authority granted in the Emergency Price Control Act makes no provision for the filing of a protest by a tenant and that, therefore, the protest filed by the complainats did not conform to the requirements of said regulation within the meaning of Section 1300.220 of said regulation.

[fol. 47] The appeal from the said dismissal of the complainants' protest and also from the order of the Price Administrator authorizing the purchasers to pursue their local remedies to evict the complainants herein from their apartments was perfected by the filing of the complaint herein in this Court on November 19, 1945. The Price Administrator moved to dismiss this appeal December 3, 1945.

Summary of Argument

(1) The complainants, tenants herein, in the sense of Section 203 (a) and 204 (a) of the Emergency Price Control Act of 1942 are "subject to" the order of the Price Administrator authorizing the purchasers to pursue their local remedies to evict the complainants from their homes and are "aggrieved by" the order of the Price Administrator dismissing their protest thereto, in that the enforcement of the Administrator's order by means of summary proceedings in the Municipal Court of the City of New York to evict the complainants herein would require action on their part in defending themselves against such proceedings so authorized, and if defeated, in removing themselves and their families from their homes. (2) Complainants contend that Section 1300.216 of Revised Procedural Regulation No. 3 does not prohibit the filing of a protest to an order of the Price Administrator or the bringing of an appeal from the dismissal of said protest. (3) A construction of Section 1300.216 of the Revised Procedural Regulation No. 3 restricting the right to protest an order of the Price Administrator and to appeal to the Emergency Court of Appeals from the dismissal of said protest by the Adminis-

trator, to landlords only, contravenes the letter and spirit of Section 203 (a) and Section 204 (a) of the Emergency Price Control Act of 1942, as defined by its legislative history and is a violation of the Fifth Amendment of the Constittuion in depriving the complainants of their property without due process of law.

[fol. 48] Argument

Point I

The complainants had standing to protest to the Administrator and now have the right to appeal to this Court pursuant to Sections 203 (a) and 204 (a) of the Emergency Price Control Act of 1942 because they are "subject to" the order of the Price Administrator issuing certificates relating to their eviction and are "aggrieved by" the dismissal of their protest by the Price Administrator in the sense that the enforcement of the authority given to the purchasers to seek their remedies at local law to evict the complainants herein would require action on their part in defending themselves against eviction, and if defeated, in removing themselves from their homes.

Section 203 (a) of the Emergency Price Control Act of 1942 (50 U. S. C. A. Appendix Sec. 923 a) provides in part as follows:

> "At any time after the issuance of any regulation or order under Section 2 * * * any person subject to any provision of such regulation, order or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections."

It thus appears that any person at all, whether the landlord or tenant who is "subject to" an order of the Price Administrator, may protest from said order to the Administrator. The words "subject to" and any provision of such regulation, order or price schedule have received definition in various regulations of the Price Administrator and have been interpreted to encompass all [fol. 49] those on whose part action is either prohibited or required. The order of the Price Administrator dated September 28, 1945, authorized the holders of proprietary

leases of the apartments of the complainants under the so-called cooperative ownership plan, as "landlords", to seek their remedies at local law to evict the complainants herein from their homes at a time when an acute housing shortage and an emergency existed, and still exists, in the City of New York and elsewhere. The Price Administrator claims that since this order was directed to the "landlords" only and required only them to take action by bringing proceedings in the Municipal Court of the City of New York to evict the complainants, they, as tenants, were not "subject to" the order. This interpretation of the words, "subject to" is both artificial and specious; for the direct result of the institution of summary proceedings by the purchasers in the Municipal Court against the complainants would be a final order causing the complainants to remove themselves from their homes. A most arduous and unhappy type of physical action would certainly be required to be taken by them, since the complainants have no defense to the summary proceedings which could properly be asserted in the Municipal Court; for by Section 204 (d) of the Emergency Price Control Act of 1942[2],

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[2] Section 204 (d) of the Emergency Price Control Act [50 U. S. C. A. Appendix 924 (d)] provides in part:

> "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 (section 902 of this appendix), of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order or price schedule, or to stay, restrain, enjoin or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule or to restrain or enjoin the enforcement of any such provision."

[fol. 50] said Court has no jurisdiction to consider the validity of an order of the Price Administrator. The issues of fraud in the procurement of the letter of interpretation of hardship, which formed the basis for the issuance of the said certificates relating to eviction, cannot be attacked collaterally in the Municipal Court. Nor can the question whether the purchasers had complied with the prerequisites of Section 6 (b) (2) of the New York City Regulations for Housing be properly decided in the Municipal Court. Similarly, the question whether the cooperative ownership plan sponsored by Messrs. Earle and Carver was a true cooperative, as defined by Section 85 of the New York Cooperative Corporation Law and thereby entitled participants in the plan to proceed under subdivision II of Section 6 (b) (3) of the New York City Rent Regulation for Housing to obtain certificates of eviction of the complainants herein, be decided in summary proceedings in the Municipal Court of the City of New York. Under Section 204 (d) of the Emergency Price Control Act the Emergency Court of Appeals has exclusive jurisdiction to test the propriety of the order of the Price Administrator issuing the certificates of eviction and the subquent dismissal of the complainants' protest thereto.

In view of the fact that the complainants could not properly assert any defense to the summary proceedings in the Municipal Court of the City of New York, it follows that the direct result of the order of the Price Administrator authorizing the purchasers to seek their local remedies to evict the complainants herein is to cause the physical expulsion of the complainants herein from their homes. In a very real sense, therefore, the complainants are "subject to" the order of the Price Administrator.

Section 204 (a) (50 U. S. C. A. Appendix Sec. 924 (a)) of the Emergency Price Control Act provides that:

> "Any person who is aggrieved by the denial or partial denial of his protest may within 30 days after such [fol. 51] denial, file a complaint with the Emergency Court of Appeals created pursuant to Sub-Section C specifying his objections and praying that the regulation, order or price schedule protested be enjoined or set aside in whole or in part for the reasons set forth above."

The complainants were "aggrieved by" the dismissal by the Price Administrator of their protest to his order issuing the certificates of eviction for this dismissal gave a green light to the purchasers to carry through the summary proceedings for the eviction of the complainants herein. As stated above, complainants have no defense to these proceedings and necessarily, therefore, they will result in a final order causing the eviction of the complainants from their homes should it be held by this Court that dismissal of complainants' protest by the Price Administrator was proper and valid. To argue that the Price Administrator's order affected the landlord-purchasers only, is to completely lose sight of the direct consequence of the issuance of such an order.

In an attempt to support his argument, the Price Administrator cites the case of *Buka Coal Company* v. *Brown*, 133 Fed. 2d 949 at page 4 of their brief as an analogous situation in which the complainant therein was not subject to the regulations, orders or price schedules of the Price Administrator. A glance at the facts of that case, however, shows conclusively that the situation therein was not, in any way, analogous to the one at bar. There a retailer of bituminous coal took exception to the Bituminous Coal Division's minimum prices as set forth in certain river rule differentials applicable to it. In Maximum Price Regulation 120, the Price Administrator first established general maximum mine prices which, standing alone, would have cured *Buka's* trouble. However, the Administrator went on to provide in the said regulation that whenever the maximum prices, as fixed, were less than the Coal Di- [fol. 52] vision's minimum price, the maximum price should be raised to the latter level. The complainant then protested Regulation 120 to the Price Administrator, which was dismissed by him, and appealed to this Court from the said dismissal. This Court, speaking through Mr. Justice Magruder, very properly dismissed the complaint on these facts for the reason that since complainant therein was seeking lower prices rather than higher prices, it was not "subject to" the Maximum Price Regulation 120 in the sense that this provision "prohibited or required action by it." *Buka's* hardship, if any, was caused by the Bituminous Coal Division's river rules establishing minimum prices and not by the Price Administrator's Maximum Price Regulation. As a matter of fact, complainant

there was quite content to accede to that part of the Maximum Price Regulation 120 which forbade his paying more than the maximum prices.

This Court stated in the *Buka* case, that which is authority for the complainants rather than for the Price Administrator upon this motion. The Court said at page 952:

> "If we assume that the effect of Section 1340.209 of Maximum Price Regulation No. 120, here protested against, is to establish maximum prices equivalent to the Coal Division's applicable minimum prices in the situation above set forth, then in one sense complainant is 'subject to' the provision because complainant is prohibited by the regulation from paying more than the maximum price so fixed."

Clearly if *Buka Coal Company* were "subject to" Maximum Price Regulation 120 in the sense that it was prohibited from paying more than the maximum price fixed therein, the complainants in the case at bar are "subject to" the order of the Price Administrator authorizing the purchasers to pursue their remedies at local law to evict the complainants herein who have no defense to such proceedings. The learned Judge continued, at page 952:

> [fol. 53] "But complainant is not objecting because it wants to pay higher prices in the maximum fixed; what it is seeking is lower prices. Insofar as complainant is unable to buy its coal for less than the Administrator's maximum price, this is due, not to any prohibition in the Maximum Price Regulation but to the bituminous Coal Division's river rules establishing minimum prices. Complainant is not entitled to protest the regulation in the respects in which the regulation does not prohibit or require action by it merely because the regulation also forbids the payment of more than maximum prices, an amount which complainant no doubt gratefully receives."

It thus appears that the *Buka* case is clearly distinguishable from the case at bar in two respects: (1) In the case at bar the direct result of a final order evicting complainants from their homes by the Municipal Court, acting upon authority contained in the Administrator's order issuing

certificates of eviction and permitting the purchasers to pursue their remedies at local law, would be to require action on the part of complainants in defending themselves against such proceeding if they had a defense and in removing from their homes, with their families and in many cases with small children, if final order is entered against them, at a time when an acute housing emergency exists and when there are no other apartments to be had in the City of New York and its environs. For that reason alone, complainants are "subject to" the order of the Administrator. Certainly, they are "aggrieved by" the denial of their Protest.

(2) In the *Buka* case, the complainant was not a party to any proceedings which set the maximum price of coal, whereas in the instant case, complainants appeared and were successful at the hearing before the Chief Branch Attorney of the New York Defense Rental Area, whose findings and recommendations were confirmed by the Area [fol. 54] Rent Director and the Regional Administrator of the OPA for Region II, before being reversed by the Price Administrator in Washington, without a hearing. Certainly, the complainants who were "parties" to these proceedings and were successful in three instances, have the right to appeal to the Court which has exclusive jurisdiction to consider the validity of order of the Price Administrator.

In *Yakus* v. *United States*, 321 U. S. 414, the Supreme Court, speaking through Chief Justice Stone, liberally construed the provisions of the Emergency Price Control Act for judicial review of the Administrator as follows at page 433:

> "In addition, the present Act seeks further to avoid that confusion by restricting judicial review of the Administrator's determination to a single court. Such a procedure, so long as it affords *to those affected* a reasonable opportunity to be heard and present evidence does not offend against due process. *Bradley* v. *Richmond*, 227 U. S. 477; *First National Bank* v. *Weld County*, 264 U. S. 450; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337." (Italics ours.)

The use of the expression, "those affected", by the Chief Justice shows clearly the intent of the Court to construe

the judicial review provisions of the Emergency Price Control Act as all inclusive rather than restricted to a particular class of persons. In defining the power of the Emergency Court of Appeals to review actions of the Administrator, Mr. Justice Stone continued at page 437:

> "The Emergency Court has power to review all questions of law including the question where the Administrator's determination is supported by evidence, and any question of the denial of due process for any pro- [fol. 55] cedural error appropriately raised in the course of the proceedings."

It therefore appears that although Congress was impelled by the pressure of the emergency situation then existing to authorize summary action on the part of the Price Administrator, the Supreme Court in construing this Act made it quite clear that the action of the Administrator would always be subject to later judicial review. (*Yakus v. United States* (1943), 321 U. S. 414, 442.)

Point II

Section 1300.216 of Revised Procedural Regulation No. 3 does not restrict the right to protest from an order of the Price Administrator to landlords only as argued by the Price Administrator.

In his brief at pages 4, 5 and 6, the Price Administrator argues that Section 1300.216 of Revised Procedural Regulation No. 3 restricts the right to protest an order of the Price Administrator only to landlords who are subject to the orders or regulations of the Administrator in the sense that action on their part is prohibited or required by said order or regulation.

Section 1300.216 provides as follows:

> "Section 1300.216 Right to protest. Any landlord subject to any provision of a maximum rent regulation, or of an order issued under Section 1300.210 of this regulation, or of an order entered under section 5 (d) of any maximum rent regulation, or of an order entered by the rent director under Section 1300.207 of this regulation, may file a protest in the manner set forth below. A landlord is, for the purposes of this regulation, subject to a provision of a maximum rent

[fol. 56] regulation or of an order only if such provision prohibits or requires action by him. Any protest filed by a landlord not subject to the provision protested, or otherwise not in accordance with the requirements of this regulation, may be dismissed by the Administrator."

A careful reading of this section and its appropriate cross references indicates that the right to protest is restricted only to landlords subject to a provision of a maximum rent regulation or an order entered by a regional administrator or an order entered by a rent director. Nowhere in this section is there any provision affecting the right of either a landlord or a tenant to protest to *an order of the Price Administrator*. *A fortiori*, there is no provision in this section affecting the right of a landlord or a tenant to appeal to the Emergency Court of Appeals from the dismissal of its protest by the Price Administrator to an order issued by him.

In the case at bar, the complainants were not protesting from an order made by the Area Rent Director or the Regional Rent Administrator for the simple reason that the orders issued by these officials were in their favor and denied the application of the purchasers for certificates of eviction of the complainants. Rather, it was the purchasers who protested to the Price Administrator from the denial of their applications for certificates of eviction by the Chief Branch Attorney, the Area Rent Director of the New York City Defense Rental Area and the Regional Administrator of the OPA for Region II. The tenants' protest to the Price Administrator related to the order issued by him granting the landlord's protest and authorizing them to pursue their local remedies to evict the complainants. This appeal to the Emergency Court of Appeals is taken from the order issued by the Price Administrator dismissing said protest and from the order of the Price Administrator issuing the certificates of eviction. It is patent, therefore, that there [fol. 57] is nothing in Section 1300.216 or any other section of Revised Precedural Regulation No. 3 which restricts the right of appeal of tenants, such as the complainants herein, under the facts of the case at bar. We must, therefore, look to the provisions of the Emergency Price Control Act of 1942, as amended, in order to determine whether the complainants have standing to appeal to this Court. These

provisions, Section 203 (a) and Section 204 (a) (50 U. S. C. A. Appendix Sec. 923 (a) and 924 (a)), as set forth in Point I, *supra*, clearly support the proposition that the complainants herein are "subject to" the order of Price Administrator authorizing the purchasers to commence proceedings to evict the complainants and were "aggrieved by" the dismissal of their protest to the Administrator from said order, and as such had standing to protest to the Price Administrator from his order issuing the said certificates of eviction and to appeal to this Court from the dismissal thereof.

Point III

The Price Administrator's interpretation of Section 1300.216 of the Revised Procedural Regulation No. 3 denying the right of the complainants herein as tenants to protest the unreasonableness of his order issuing certificates relating to their eviction and to appeal from the subsequent dismissal by him of said protest is in direct contravention to the letter and spirit of the Emergency Price Control Act as defined by its legislative history and violates the Fifth Amendment of the Constitution by depriving complainants of their property rights in their apartments without due process of law.

The legislative history of the Emergency Price Control Act of 1942, as amended, shows the clear intent of Congress to permit any one affected by an order of the Price Administrator to appeal therefrom to the Emergency Court of [fol. 58] Appeals. Thus, the declaration of purposes, as set forth in the report of the Committee of Conference on the disagreeing votes of the two houses of Congress, on the amendment of the Senate to House of Representatives Bill No. 5990, which was the proposed Emergency Price Control Act as reported in Volume 88 of the Congressional Record at page 661, January 26, 1942 (four days before the effective date of the Act) stated one of the policies of the Act to be:

> "(11) the protection of the interests of those subject to the Act by providing procedures for administration and review."

The Record defined this policy at page 663 as follows:

> "ADMINISTRATION AND REVIEW. Both the House bill and the Senate amendment vested the administration of the bill in a single Price Administrator. * * * the Senate amendment provided (2) * * * direct judicial review of regulations and orders of the Administrator by an Emergency Court of Appeals composed of federal judges designated for service at such court by the Chief Justice of the United States."

The Record continues as follows, pages 663, 664:

> "The Senate amendment also provided that a statement of considerations must accompany every regulation or order establishing a maximum price, *that every such regulation or order should be subject to protest proceedings*, that if any protest should be denied the Administrator must advise the protestant of the grounds upon which such denial was based * * *"

The Conference agreement adopted the provisions of the Senate amendment (Volume 88 Congressional Record p. 664).

[fol. 59] Congressman Henry B. Steagall, speaking in behalf of the Conference Report stated at pages 664, 665, Volume 88 Congressional Record:

> "Another provision that has been controversial throughout the entire consideration of the bill hinges on the question of the authority to be established for the administration of the law. The House bill provided for the administration of the law by a single Administrator whose office was created by the bill. There was included in the House bill, as reported by the Committee on Banking and Currency, a provision establishing a special Appellate Court of not less than three circuit or district court judges, named by the Chief Justice of the United States, with the right to add additional members whenever required, the Court to be permitted to sit in divisions when necessary. *The provision also gave anybody dissatisfied with an order, ceiling or regulation of the Administrator the right to appear and protest the action of the Administrator.* The Administrator was required to take action

on such protest within 30 days. Thirty days would be required in which an appeal might be made to the Emergency Court of Appeals established under the bill, with the duty of the Court to review the decision of the Administrator in establishing ceilings or other regulations under the bill.

"The Conference Report follows substantially the bill reported by the House Committee on Banking and Currency. That is the plan embodied in the Conference Report." (Italics ours.)

During the course of the debate in the House on the Conference Report, Congressman William T. Pheiffer of New York (no relation to the attorney for the complainants), speaking in behalf of the Report, stated at page 687:

"* * * under the provisions of the Conference report, when the Price Administrator after all this [fol. 60] investigation which he makes fixes a price, *anyone who is aggrieved by reason of that decision has the right to enter a protest. He may file a protest and within 30 days he has a right to have a decision upon his protest. If that is denied, then he has the right to appeal to a court,* not an administrative board but an independent court set up and established under the provisions of the Conference report, the members of which court are appointed, if you please, by the Chief Justice of the United States Supreme Court. That court has the right and it is its duty to review the proceedings under which the price ceiling was fixed by the Administrator. If the Administrator does not follow the law which this Congress lays down, he is reversed and may I say that we are determining that policy. It is a legislative policy. * * * The Congress lays down the standards and establishes the procedure and tells and directs the Administrator what he shall do." (Italics ours.)

A motion to recommit the Conference Report to the Committee of Conference was defeated (Volume 88 Congressional Record p. 688) and the Conference Report was confirmed by the House page 688 and by the Senate page 725. No extensive discussion concerning the Administration and Review provisions of the Conference Report appeared in the report of the debate thereon in the Senate.

It is evident from the statement of purposes of the Act as to Administration and Review in the Conference Report and the debate thereon, that Congress had in mind a careful check upon the powers of the Administrator under the Act by this very Court. Nowhere does there appear the slightest suggestion of any technicalities such as contained in Revised Procedural Regulation No. 3 which might be construed as restricting the right to protest an order of the Price Administrator and to review the dismissal of said protest in the Emergency Court of Appeals only to a particular class of persons such as landlords. A reading [fol. 61] of the entire record of the debates in both the House and Senate must convince one that although Congress wished to make effective price controls during the Emergency, it still intended that persons who would be affected by orders of the Administrator would be able to review the same in a higher forum.

In the case at bar, we have a situation where the complainants were parties to extensive hearings, including about one thousand pages of testimony of witnesses on both sides and cross examination by opposing counsel, before the Chief Branch Attorney of the New York City Defense Rental Area on the application of the purchasers for certificates of eviction. Detailed findings of fact, conclusions of law and recommendations were made by him to the Area Rent Director who subsequently confirmed the report denying the application of the purchasers for certificates of eviction on the ground that they had not complied with the statutory prerequisites of Section 6 (b) (2) of the New York City Regulation for Housing and in that they had made fraudulent statements in the letter of their representative requesting a letter of interpretation concerning hardship which became the basis for the issuance of the certificates of eviction of these complainants in the order of the Price Administrator dated September 28, 1945. Thereafter, this report was confirmed by Leo F. Gentner, Acting Regional Administrator of the OPA for Region II, and the purchasers protested this decision to the Price Administrator who summarily reversed the three previous officials without a hearing of any kind.

Can it be said that this action of the Price Administrator, which was challenged first in the protest to the Price Administrator and reiterated in the complaint on this appeal as "unfair, unreasonable, arbitrary, unequitable and

capricious and not in accordance with the law" (paragraph 16 (h)) ends the litigation? Can the Price Administrator reverse the report and findings of the Chief Branch Attorney, the Area Rent Director and the Regional Administra-
[fol. 62] tor, wtihout a hearing and wtihout subjecting his decision to review by a court of law? Such a holding would place the Price Administrator in the position of unchallenged power to cause unjustly the eviction of tenants all over the land at a time when an acute housing shortage prevails throughout the country without allowing these displaced persons to appeal from any unwarranted exercise of his authority.

In still another respect, a denial of a tenant's right to appeal from an order of the Price Administrator issuing certificates relating to such tenant's eviction would make a mockery of the declared purposes of the Emergency Price Control Act. Section 201 (a) of this Act (50 U. S. C. A. Appendix Sec. 901 (a)) provides:

> "It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and prevent speculative, unwarranted and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disrupting practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; * * *"

Apparently with this statement of the policy of the Act in mind Robert S. Fougner, Regional Rent Attorney for the OPA of the New York Area, warned the members of the Bar Association of the State of New York in a speech reported in the "New York World Telegram", page 32 on May 2, 1945, that owners of apartment buildings were demanding excessive rentals on midtown properties under the guise of selling living quarters as cooperative apartments. Mr. Fougner was reported in the newspaper as saying:—

> "That preliminary reports reaching my office indicate that in many instances real estate operators are not submitting renewal leases to tenants. Instead, [fol. 63] they are attempting to persuade the occupant

to purchase the apartment as part of a cooperative venture. The arguments advanced by the real estate operators in supporting the purchase of the apartment are based on (1) the tax saving provided by both Federal and New York State income tax laws and (2) to obtain security in the postwar era when operators anticipate a continued tight housing situation even if OPA controls are relinquished.

"The development of a cooperative corporation with the resultant eviction of tenants creates a far more disruptive practice than is involved in the sale of an ordinary one or two family house.

"It is not the purpose nor the right of the Rent Administrator to prevent a tenant from becoming an owner of his apartment—if that is the tenant's bona fide intention."

Mr. Fougner concluded his address with an assertion which must seem ironic when read in the light of the facts of the instant case.

"But it is the right and duty of the Administrator to prevent mass eviction of apartment house tenants or the forced sale of accommodations to their present tenants as an alternative to eviction.

"The Administrator will use all legal means at his disposal to stop this practice which has gained rapid headway within the past few weeks."

As we have alleged in the complaint, the sole purpose of the so-called plan for the cooperative ownership of the apartments in 55 Central Park West, New York City, was to net to the sponsors thereof a return of $381,000.00 through the sale of these apartments in a building in which there was no equity, at a time when the acute housing shortage in the City of New York made it possible for these sponsors to extort exorbitant prices for the apartments. [fol. 64] The points raised by the complainants in opposition to the issuance of certificates of eviction, sustained as they were by the Chief Branch Attorney, the Area Rent Director and the Acting Regional Administrator, all set forth in their protest to the Price Administrator, and in their complaint filed herein (par. 17) if sustained by this Court will necessarily nullify the effect of the order of the Administrator permitting the commencement of the dispos-

sess proceedings against the complainants in the local courts.

All of these points, we submit, have merit and should be given consideration upon a review of the Administrator's orders, now pending in this Court.

The reversal by the Price Administrator of the recommendations of the Chief Branch Attorney, as confirmed by the Area Rent Director and subsequently by the Acting Regional Administrator of the OPA for Region II contravenes the spirit of the Emergency Price Control Act of 1942, as elucidated in the debates in Congress as well as the statement of the policy of the OPA by Mr. Fougner above quoted.

Any construction of Section 1300.216 of the Revised Procedural Regulation No. 3 which would prohibit an appeal by tenants, such as the complainants herein, is not only unjust and opposed to the public policy enunciated in the Act but is also null and void for it is well settled that any regulation which is inconsistent with the statute it proposes to explain is a mere nullity.

In *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue* (1935), 297 U. S. 129, Mr. Justice Sutherland of the United States Supreme Court, said at page 134:

> "The power of an administrative officer or board to administer a Federal statute and to prescribe rules and regulations to that end is not the power to make a law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect [fol. 65] the will of Congress as expressed by the Statute. A regulation which does not do this, but operates to create a rule out of harmony with the Statute, is a mere nullity. *Lynch* v. *Tilden Produce Co.*, 265 U. S. 315, 320, 322, 44 Sup. Ct. Rep. 488; *Miller* v. *United States*, 294 U. S. 435, 439, 440, 55 Sup. Ct. 440, and cases cited. And not only must the regulation, in order to be valid, be consistent with the statute, but it must be reasonable. *International R. Co.* v. *Davidson*, 257 U. S. 506, 514, 42 Sup. Ct. 179; . . . ."

The Court continued as follows at page 135:

> "The statute defines the rights of the taxpayer and fixes a standard by which such rights are to be measured. *The regulation constitutes only a step in the administrative process. It does not, and could not, alter the statute.* It is no more retroactive in its operation than a judicial determination construing and applying a statute to a case in hand." (Italics ours.)

The same thought was cogently expressed by Judge Goddard of the United States District Court, Southern District of New York, in *Saks* v. *Higgins* (1939), 29 Fed. Supp. 996. He said at page 999:

> "* * * the interpretation of a statute always remains the function of the judiciary. The regulation cannot change what the Act originally meant."

Moreover, any regulation which could be utilized to cause the eviction of tenants without according to them the right of judicial review of the propriety and reasonableness of the order of an administrative official, such as the Price Administrator, would violate the provisions of the Fifth Amendment which forbids the taking of property of a citizen of the United States wtihout due process of law.

In *Bowles* v. *Willingham* (1943), 321 U. S. 503, the constitutionality of the Emergency Price Control Act was [fol. 66] challenged on the ground that no hearings were permitted to landlords before the effectuation of maximum rent orders. In upholding the reasonableness of this procedure, the Court said, through Mr. Justice Douglas, at page 521:

> "To require hearings for thousands of landlords before any rent control order could be made effective might have defeated the program of price control * * *. *But where Congress has provided for judicial review after the regulations or orders have been made effective, it has done all that due process under the War emergency requires.*" (Italics ours.)

Conversely, however, if Section 1300.216 is construed to restrict the right of appeal from an order of a Price Ad-

ministrator to a landlord only, then a tenant, who is deprived of his right to continue in possession of his apartment by an order of the Price Administrator which was procured by fraud and contrary to the express provisions of regulations promulgated by the Administrator and said tenant is further prohibited from testing the propriety of such an order by appeal to the only court which has jurisdiction to consider the validity of said order, then said tenant is thereby deprived of his property without due process of law contrary to the provisions of the Fifth Amendment of the Constitution.

Conclusion

The complainants herein have standing to invoke the appellate jurisdiction of this Court because they are "subject to" the order of the Price Administrator issuing certificates relating to their eviction in the sense that as a direct result of said order they would be required to defend the proceedings when instituted and in the absence of a defense or if defeated, to remove themselves from their homes at a time when an acute housing shortage existed, and still exists, in the City of New York. For the same reasons com- [fol. 67] plainants were "aggrieved by" the dismissal of their protest to the Price Administrator from the issuance of said certificates of eviction. Section 1300.216 of Revised Procedural Regulation No. 3 does not prohibit the complainants, as tenants, from appealing to this Court because the complainants were not protesting from an order of the Regional Administrator or the Area Rent Director or a maximum rent regulation as encompassed by this section but rather were protesting to the Price Administrator from an order made by him and, therefore, come under the provisions of Section 203 (a) and Section 204 (a) of the Emergency Price Control Act of 1942 which grants to anyone "subject to" or "aggrieved by" an order of the Price Administrator the right to protest to the Price Administrator and to judicial review of the dismissal of said protest, in the Emergency Court of Appeals. Any construction of Section 1300.216 of the Revised Procedural Regulation No. 3 which denies to the complainants, as tenants, the right to appeal to the Emergency Court of Appeals contravenes the letter and spirit of the Emergency Price Control Act

of 1942 and violates the Fifth Amendment in depriving the complainants of their property rights in and to their apartments without due process of law.

For the reasons here assigned the motion to dismiss complainants' complaint should be denied.

Respectfully submitted, Alexander Pfeiffer of the firm of Pfeiffer & Crames, Attorneys for Complainants, 551—5th Avenue, New York 17, N. Y.

Alexander Pfeiffer, Paul N. Pfeiffer, of Counsel.

[fol. 72] [Stamp:] United States Emergency Court of Apeals. Filed Jan. 4, 1946. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, et al.,

v.

CHESTER BOWLES, Price Administrator

Now come Jack Parker, et al., by their duly authorized attorney, Alexander Pfeiffer, of Pfeiffer & Crames, and move for leave to orally argue the motion made herein by Chester Bowles, Price Administrator, to dismiss the complainants' complaint, such argument to take place either in Washington, D. C., or New York, as the Court may direct.

The annexed affidavit sets forth the reason for this application.

Dated: New York, January 3, 1946.

Respectfully submitted, Alexander Pfeiffer, of the firm of Pfeiffer & Crames, Attorneys for the Moving Parties Herein, Office & Post Office Address, 551 Fifth Avenue, New York 17, N. Y.

[fol. 73] IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, et al.,

v.

CHESTER BOWLES, Price Administrator

STATE OF NEW YORK,
County of New York, ss:

Alexander Pfeiffer being duly sworn, says: I am the attorney for the complainants herein and make this affidavit

in support of this motion for leave to orally argue the motion made by Chester Bowles, Price Administrator, to dismiss the complainants' complaint herein.

Briefs have been submitted to this Court upon such motion by the Price Administrator in support of his motion, and by the complainants in opposition thereto. It is unnecessary therefore to recite the facts or the law having application to the question involved upon the motion to dismiss the complainants' complaint. However, the attention of the Court is called to the fact that the question involved upon the motion has never been decided either directly or indirectly, as we point out in the brief submitted in behalf of the complainants. Whether the tenants in the situation in which they were involved in the proceeding for certificates of eviction are subject to the order of the Price Administrator, and whether upon the dismissal of their protest they had the right to appeal to this Court, has never been, as I understand it, presented for determination or decided.

The case upon which the Price Administrator relies is one entirely different from the instant case and has been distinguished in our brief. In view of the importance of this motion to the complainants, I am anxious, in their behalf, to orally argue this motion so that in the course of the argument, if any questions are presented, they can be answered then and there, and so that the Court, in the determination of this question, may have not alone the benefit of the written brief but the oral argument of counsel, which is frequently most essential and important in the [fol. 74] proper disposition, particularly of an appeal.

Any time that this Court may appoint for the argument will be satisfactory to me, and the place of the argument, Washington or New York, would also be satisfactory, and if it is more convenient for the Price Administrator that the argument take place in Washington, I shall be glad to argue the motion there. I do believe, however, that the interests of the complainants would best be served by an oral argument, in addition to the briefs submitted in their behalf.

No previous application has been made for this relief, except that in the answer accompanying the brief, an oral argument was requested.

Wherefore, I respectfully request that an oral argument of the motion to dismiss the complainants' complaint be permitted.

Sworn to before me this 3rd day of January, 1946,
Rose Hoqpauir, Commissioner of Deeds, N. Y. C.,
New York Co. Clk's No. 25, Reg. No. 7-H-22.
Commission Expires March 13, 1947.

Alexander Pfeiffer.

[fol. 75] [Stamp] United States Emergency Court of Appeals. Filed Jan. 18, 1946. Herman C. Beasley, Clerk.

UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, et al.,

v.

CHESTER BOWLES, Price Administrator

ORDER

It is ordered that the Respondent's motion to dismiss the complaint in the above entitled case be assigned for hearing and determination to a division of the court consisting of Chief Judge Maris, Judge Magruder and Judge McAllister.

By the Chief Judge.

Teste: Herman C. Beasley, Clerk.

January 18, 1946.

[fol. 76] Friday, January 18, 1946.

Pursuant to adjournment and call of the Chief Judge, the Court met at 10:30 A. M., at New York, New York.

Before Honorable Albert B. Maris, Chief Judge, and Honorable Thomas F. McAllister, Associate Judge.

No. 271

JACK PARKER, et al.,

vs.

CHESTER BOWLES, Price Administrator

Argument on Respondent's motion to dismiss the complaint commenced by Mr. Jacob D. Hyman, for Respondent, continued by Mr. Alexander Pfeiffer, for Complainants, and concluded by Mr. Jacob D. Hyman, for Respondent. Mr. Louis L. Tetelman appeared and argued as amicus curiæ.

Counsel for both sides stipulated orally that Judge Magruder, who was unable to be present, might participate in the determination of the motion to dismiss the complaint.

Upon oral motion, Mr. Louis L. Tetelman was granted leave to appear and argue and file a brief on behalf of Ada M. Becker, et al., Landlords, as amici curiæ, without prejudice on the issue of intervention of Landlords as parties.

[fol. 77] [Stamp:] United States Emergency Court of Appeals. Filed Mar. 13, 1946. Herman C. Beasley, Clerk.

UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, et al.,

vs.

CHESTER BOWLES, Price Administrator

Now comes Jacob D. Hyman, Associate General Counsel of the Office of Price Administration, and respectfully suggests to the Court that Chester Bowles resigned as Price Administrator on February 26, 1946, and that Paul A. Porter has been appointed by the President, by and with the advice and consent of the Senate, as Price Administrator, in accordance with the provisions of Section 201(a) of the Emergency Price Control Act of 1942; that Paul A. Porter has duly qualified as Price Administrator by taking the oath of office on February 26, 1946, at 11:15 A. M.; and that it would be in the public interest and in accordance with Rule 28(b) of the Rules of this Court and Sec. 11 of the Act of February 13, 1925, c. 229 (43 Stat. 941), U. S. C. Title 28, Sec. 780, for this Court to order the substitution of Paul A. Porter, Price Administrator, for Chester Bowles, as Respondent in the above entitled cause.

Respectfully submitted, Jacob D. Hyman, Associate General Counsel.

Dated: March 13, 1946.

[fol. 78] [Stamp:] United States Emergency Court of Appeals. Filed Mar. 13, 1946. Herman C. Beasley, Clerk.

UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, et al.,

vs.

CHESTER BOWLES, Price Administrator

ORDER

Upon consideration of the suggestion of the resignation of Respondent, Chester Bowles, as Price Administrator,

filed herein by Jacob D. Hyman, Esquire, Associate General Counsel of the Office of Price Administration, and the Court being advised that Paul A. Porter has been appointed by the President of the United States as Price Administrator, in accordance with Section 201(a) of the Emergency Price Control Act of 1942 as amended, and has duly qualified as Price Administrator by taking the oath of office on February 26, 1946, it is

Ordered that Paul A. Porter, Price Administrator, be, and he is hereby, substituted as Respondent in the above entitled case.

By the Chief Judge.

Teste: Herman C. Beasley, Clerk.

March 13, 1946.

[fol. 74] IN UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER et al.,

v.

PAUL A. PORTER, Price Administrator

Heard at New York, January 18, 1946

Before Maris, Chief Judge, and Magruder and McAllister, Judges

Mr. Alexander Pfeiffer, for the complainants.

Mr. Jacob D. Hyman, Associate General Counsel, with whom Mr. Richard H. Field, General Counsel, of the Office of Price Administration, was on the brief, for the respondent.

Mr. Louis L. Tetelman, amicus curiae.

OPINION OF THE COURT—Filed March 13, 1946

By MARIS, Chief Judge:

The complainants are tenants of apartments in an apartment house located at 55 Central Park West, New York City, owned by the 55 Corporation. They seek to set aside orders of the Price Administrator issued under section 6 (b) (2) of the Rent Regulation for Housing in the New York City Defense-Rental Area [1] which granted to certain purchasers of stock of the 55 Corporation who had acquired with their stock proprietary leases of the apartments in question certificates authorizing them to pursue their legal remedies for the eviction of the tenants. The latter filed a joint protest against the Administrator's orders which the Administrator dismissed. The tenants thereupon filed the present complaint in this court under Section 204 (a) of the Emergency Price Control Act. The Administrator has moved to dismiss the complaint upon the ground that the complainants are without standing to file it.

Section 204 (a) provides that only a person aggrieved by the denial of his protest may file his complaint under that

[1] 8 F. R. 13914.

section. Such a complainant must therefore have had standing to file a protest under Section 203 (a). Under that section, however, only a person "subject to" a provision of a regulation or order may file a protest against it. [fol. 75] We are therefore presented with the question whether a tenant of a housing accommodation with respect to which the Administrator has ordered a certificate of eviction to be issued is a person subject to that order within the meaning of Section 203 (a).

The Administrator contends that a person is subject to a regulation or order within the meaning of Section 203 (a) only if the regulation or orders prohibits or requires action by him. In support of this contention he refers to the legislative history of the Act [2] as well as to the decision of this court in Buka Coal v. Brown, 133 F. 2d 949 (1943). He also calls attention to the fact that he has so construed this phrase in his procedural regulations from their inception.[3]

The Administrator's contention in this respect loses some of its force, however, when it is recalled that on November 2, 1942,[4] in revising Procedural Regulation No. 1 he included in Section 1300.24 (which carried forward the provisions of Section 1300.9 of the original regulation) the proviso:

> "That a producer of an agricultural commodity shall be considered to be subject to a maximum price regula-

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[2] Sen. Rep. No. 931, 77th Cong., 2d Sess. (1942), p. 22:

> "Section 203 (a) is designed to provide the advantages of a hearing, in a manner consistent with the need for expeditious determinations, to all persons who are required to obey the provisions of regulations or orders under section 2."

[3] Section 1300.9 of Procedural Regulation No. 1 issued February 12, 1942 (7 F. R. 971): "A person is, for the purposes of this Regulation, (§§ 1300.1 to 1300.56, incl.) subject to a provision of a maximum price regulation only if such provision prohibits or requires action by him."

Section 1300.215 of Revised Procedural Regulation No. 3 issued January 12, 1943 (8 F. R. 526): "A landlord is, for the purposes of this regulation, subject to a provision of a maximum rent regulation or of an order, only if such provision prohibits or requires action by him."

[4] Revised Procedural Regulation No. 1, Section 1300.24, 7 F. R. 8961.

> tion for the purpose of asserting any right created by section 3 (c) of the Emergency Price Control Act of 1942 . . . for the benefit of producers of such an agricultural commodity.

Since such regulations do not prohibit or require action by farmers this proviso clearly extends the concept of the phrase in question beyond that here contended for. Moreover in Illinois Packing Co. v. Snyder, 151 F. 2d 337 (ECA 1945), this court held that a person who contended that he was arbitrarily and capriciously discriminated against in a regulation providing for the payment of subsidies was a person subject to the regulation within the meaning of Section 203 (a). We think, therefore, that it cannot be said that the right to file a protest against a regulation or order issued under Section 2 of the Emergency Price Control Act must in all cases be restricted to the extent for which the Administrator here contends.

The question then is whether in the case before us, that of tenants of housing accommodations, it is the purpose of the Act to accord the tenants administrative and judicial review of the action of the Administrator in permitting their landlords to undertake eviction proceedings against them. We think that the answer to this question depends upon whether the orders in controversy deprived the tenants of the opportunity to enjoy a right of possession which was vested in them and which they would have been entitled [fol. 76] to enforce except for those orders. If the orders did deprive them of the opportunity to enforce and enjoy such a vested right they were subject to them within the meaning of the Act and, therefore, entitled to protest them. If, on the other hand, the tenants had no such vested right the orders deprived them of nothing to which they were entitled. Under such circumstances they could hardly be said to be subject to the orders in any real sense and would, therefore, have no standing to protest them.

The so-called certificates of eviction which the Administrator issued did not themselves authorize or require the tenants' eviction. Nor did they operate to deprive the tenants of any right to possession which they otherwise had under their leases or the laws of New York. The certificates merely removed the ban of Section 6 of the Rent Regulation for Housing against eviction and left the landlords free to employ any remedies which the leases and the local law gave

them for the recovery of possession if they could show that they were entitled to it. Consequently the only right which the certificates of eviction could possibly be said to have jeopardized was the right, if any, to possession of their apartments which the Emergency Price Control Act and the Rent Regulation for Housing conferred upon the tenants by virtue of the ban of Section 6 of the Regulation against eviction. Only if the Act and Regulation conferred such a right upon the tenants did they have standing to file their protest and the present complaint.

An examination of the Emergency Price Control Act, however, discloses that it was not one of its purposes to give to tenants any right to remain in possession of the defense-area housing accommodations which they might happen to occupy. When Congress has seen fit to make such a provision for tenants it has used apt language to express its purpose [5] but it did not do so in this case. Its sole purpose here, so far as defense-area housing accommodations are concerned, was to control the amount of rents of such accommodations and to prevent speculative, unwarranted and abnormal increases therein. The only reference in the Act to the possession of housing accommodations is contained in Section 2(d), which in this respect provides:

> "(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit . . . speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in . . . rent increases, . . . inconsistent with the purposes of this Act."

It will thus be seen that the power to regulate practices relating to recovery of the possession of defense area housing accommodations is given to the Administrator only incident to his power to prevent improper rent increases and

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[5] District of Columbia Rents Act of October 22, 1919, c. 80, § 109, 41 Stat. 298, 301, construed in Block v. Hirsh, 256 U. S. 135 (1921); Soldiers & Sailors Civil Relief Act of 1940, 54 Stat. 1178, 1181, 50 U. S. C. A. App. § 530.

evasive practices likely to result in such increases. Only [fol. 77] to this necessary extent is the vested right of a landlord to recover possession of his property to be restrained by the Administrator under the Act. The language of Section 6 of the Rent Regulation for Housing which bans the removal of tenants except under certain circumstances and provides for the issuance of certificates of eviction must be read in this light. If construed as extending to cases which do not involve the possibility of practices likely to result in rent increases it would lose its statutory support. Compare Taylor v. Bowles, 145 F. 2d 833 (ECA 1944).

It will, of course, be conceded that most tenants of defense-area housing accommodations do in fact enjoy a substantial measure of protection against eviction as a result of the Regulation's prohibition against eviction except under circumstances found by the Administrator not to be susceptible to manipulation tending to evade rent ceilings. But neither the Act nor the Rent Regulation for Housing gives to any tenant any vested or enforceable right of possession as against his landlord which he would not otherwise have under his lease or the local law. This becomes clear when it is considered that the ban against eviction imposed by Section 6 of the Rent Regulation finds its only justification and support in the possibility that the landlords to which it applies may otherwise use eviction proceedings in order to compel the payment of increased rents. It is not imposed and under the Act it may not be imposed because of any necessities of the tenant or his inability to secure other housing accommodations.

It follows that when the Administrator has determined, as he did here, that eviction will not be inconsistent with the purpose of the Act to prevent rent increases, no rights of the tenants have been affected so as to give them standing to protest. This is true even though, as here, the Administrator invited statements from the tenants in response to the landlord's petitions and permitted them to participate in the oral hearing of these petitions. This was doubtless wise administrative procedure which enabled the Administrator to become fully informed with respect to all the facts which might have any bearing upon the questions raised by the petitions but it did not, as the complainants urge, make the tenants parties to the proceedings. It will be seen that this must be so when it is remembered that no showing which any one of the tenants might have made with respect to his

own situation and necessities could have had the slightest bearing upon the Administrator's determination of the question raised by the landlords' petitions. That question at bottom was simply whether the landlords had shown that their proposed eviction proceedings were of a character which did not involve the possibility of increasing rents in derogation of the war effort. The tenants' interest with respect to this question was no different in character from the interest of the public generally.

What has been said disposes of the complainants' contention that the failure to accord them administrative and judicial review of the Administrator's action violates the due process clause of the Fifth Amendment. For the issuance by the Administrator of his so-called eviction certificates did not deprive the complainants of any vested right under their leases or the local law to the possession of the defense-area housing accommodations which they occupy. [fol. 78] Since, as we have seen, neither the Emergency Price Control Act nor the Rent Regulation for Housing gives them such a right, the Administrator's action cannot be said to have constituted a deprivation of their property with respect to which due process of law was required. The mere fact that they may be prevented from enjoying an incidental and fortuitous benefit under the Act does not have that effect. Compare Pennie v. Reis, 132 U. S. 464 (1899); Violet Trapping Co. v. Grace, 297 U. S. 119 (1936); Ingraham v. Hanson, 297 U. S. 378 (1936); Wright v. Central Ky. Gas Co., 297 U. S. 537 (1936); Dodge v. Board of Education, 302 U. S. 74 (1937).

A judgment will be entered dismissing the complaint.

Concurring Opinion

Magruder, Judge, concurring:

With some hestitation I concur in the opinion by Chief Judge Maris. The phrase "subject to" is of undefined content, and a reviewing court must necessarily develop its more exact meaning from case to case, bearing in mind the general scheme and purpose of the Act. A relevant consideration in this connection is whether a decision by this court opening the door to judicial review in the particular type of case would produce consequences harmful to the efficient administration of the Act.

In general it can be said that judicial review is available to sellers of commodities and landlords having housing accommodations to rent—persons whose activities are put under constraint by the mechanisms of governmental price control. The Price Administrator represents the interests of buyers and tenants in the battle against inflation, and there is no indication in the legislative history of the Act that Congress intended to bring the regulations or orders of the Administrator under judicial review at the instance of buyers or tenants.

Certainly tenants as a class are not entitled to protest a rent regulation on the ground that it froze rents in the defense-rental area at too high a level. I cannot see that a tenant is in any stronger position when the order he objects to is not of general applicability but is one affecting the particular premises he is occupying. Under the various adjustment provisions of the Rent Regulation for Housing, Area Rent Directors issue hundreds of orders giving landlords individual increases of maximum rents. It is important to the fair administration of the Act that relief in these cases be given promptly and with a minimum of red tape. Yet if we accept the reasoning in Judge McAllister's dissenting opinion, it would seem necessarily to follow that orders granting landlords' applications for adjustment of maximum rents would be protestable by the tenants affected—thereby imperiling the efficient administration of the Act.

We have upheld the provisions of the Rent Regulation restricting the eviction of tenants as being appropriate to effective rent control and authorized under § 2(d) of the Act. *Taylor* v. *Brown*, 137 F. (2d) 654, 662 (1943), cert. denied 320 U. S. 787 (1943). The landlord in most instances must obtain from the Administrator a certificate of eviction before pursuing his remedies under the local law for the recovery of possession. Some administrative [fol. 79] delay is unavoidable before the landlord is free to proceed. See *Taylor* v. *Bowles*, 145 F. (2d) 833 (E. C. A. 1944). The Administrator must first be satisfied that evictions of the character proposed are not inconsistent with the purposes of the Act or of the Regulation and would not be likely to result in the circumvention or evasion thereof. In making this determination the Administrator acts in protection of the interest of the tenant. Once

the determination is made in favor of the landlord, the tenant has no further legal interest in continued possession beyond what his contract and the local law give him. It would render somewhat illusory the landlord's right to recover possession if he were now subject to further delay during the pendency of protest proceedings instituted by the tenant, followed by review proceedings in this court.

Chief Judge Maris concurs in the foregoing views.

DISSENTING OPINION

McALLISTER, Judge, dissenting:

When the purchasers of stock in the Fifty-Five Corporation filed petitions for certificates of eviction pursuant to Section 6(b) (2) of the Rent Regulation of Housing in the New York City Defense-Rental Area, authorizing them to proceed under the local law to evict the complainants herein from their apartments, the Office of Price Administration, in accordance with its established practice, served copies of the petition, together with notices on all of the tenants concerned, advising them that they might submit any information they desired with reference to the matter, and stating that failure to return the petition with their signed statements would result in the entry of an order upon the basis of the facts available to the Rent Director.

Under Section 6(a) of the New York Rent Regulations a tenant who pays the rent to which the landlord is entitled may not be removed from any housing accommodations by action to evict or to recover possession or by exclusion from possession or otherwise, notwithstanding such tenant has no lease, or that his lease or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease agreement or obligation entered into which provides for entry of judgment upon tenant's confession of breach of covenants, or which contains provisions contrary to the regulations, with certain exceptions not relevant to the present situation. However, under the Regulation, it is provided that a purchaser of leased premises may secure occupancy thereof, provided that the Office of Price Administration grant his application for a certificate authorizing the pursuit of local remedies to remove or evict a tenant of the vendor. Under the sections of the Regulation which provide for the filing of the petition authorizing pursuit

of local remedies of eviction, the Administrator makes such investigation of the application as he deems proper prior to a determination as to whether such certificate shall be granted. Briefly, then, the tenants in this case, are entitled to occupancy of the apartments, unless a purchaser of the premises, complying with the regulations, is authorized by the Office of Price Administration to evict such tenants, and thereafter secures a judgment of eviction in the local courts.

[fol. 80] The persons filing the petitions for certificates of eviction alleged that they were purchasers and holders of proprietary leases in the apartments occupied by the tenants, under a cooperative ownership plan, sponsored by the owners of the entire capital stock of the Fifty-Five Corporation. The latter had sought to convert twenty-eight apartments into cooperatives by offering for sale shares of stock of such owning corporation which they held, to purchasers, including the purchasers herein, with proprietary leases for a term of years, of the apartments involved. The purchase price for such apartments under the proposed sharing of ownership plan aggregated approximately $390,000 over and above a first mortgage of $1,500,000.

While the cooperative was being organized, the managing agents of the owning corporation wrote the Chief Attorney for the New York City Defense-Rental Area, of the Office of Price Administration, on March 5, 1945, requesting an interpretation concerning the right of purchasers of such cooperative apartments in 55 Central Park West, to obtain certificates of eviction under the provisions of Subdivision II of Section 6(b)(3) of the Rent Regulations of the Office of Price Administration. This section provides that where a cooperative is organized on or after February 17, 1945, no certificate of eviction shall be issued, unless on such date, stock in the cooperative had been purchased by persons who were then tenants of at least 80% of the apartments in the premises, or unless on such date the cooperative was in the process of organization and the Administrator finds that substantial hardship would result from the failure to issue such a certificate.

The owners and brokers based their application for an interpretation on the latter portion of the section—that is, on the claim that substantial hardship would result to the owners of the capital stock of the corporation if they were not permitted to proceed with the conversion of some of

the apartments into cooperatives under the regulations existing prior to February 17, 1945. Annexed to their letter requesting the interpretation of the right of purchasers of such cooperative apartments to obtain certificates of eviction were certain affidavits and exhibits. On March 23, 1945, an interpretation of hardship, in favor of the owning corporation, was granted by the Office of Price Administration—erroneously, and because of fraudulent misrepresentations, as contended by the tenants—and the representatives of the owning corporation were authorized to proceed with the share-ownership plan under the regulations in existence prior to February 17, 1945. Thereafter, the alleged purchasers of the apartments involved herein applied for certificates of eviction from the Price Administrator, based on a claimed compliance with Section 6(b)(2) of the Rent Regulation for Housing in the City of New York, in effect prior to February 17, 1945, which required that the purchasers of stock for the purpose of carrying out the cooperative ownership plan, must have paid 20% of the equity and the underlying obligation of the corporation, attributable to their apartments at the time of their stock purchase.

When the foregoing applications were made for certificates of eviction, and the Office of Price Administration served copies of the petition with request for statements upon the tenants, the various tenants filed statements objecting to the granting of certificates of eviction; and the proceeding was thereafter referred to the Chief Branch [fol. 81] Attorney of the New York City Defense-Rental Area, who on a hearing took approximately 1,000 pages of testimony. He subsequently recommended denial of the applications for certificates of eviction, giving as reasons that the purchasers did not fulfill the obligation of making payment of 20% of the equity and underlying obligation of the corporation attributable to their apartments, as required by the Housing Regulation; that the letter of interpretation as to hardship issued by the Administrator, and interposed in the proceedings, was based upon misrepresentations and fraudulent statements by the real estate brokers who were acting as managers and agents for the owning corporation; that the entire presentation of the share-ownership plan by the sponsors was permeated with the implication that it was a very substantial financial transaction involving important financial commitments on the

part of the sponsors, whereas the actual fact was they had not a penny invested but were operating on an option, in the final exercise of which they hypothecated the very shares of stock which had been sold to purchasers, after payment therefor had been made, for a loan of $40,000 from a New York bank; and that this loan was for the purpose of enabling the sponsors to buy three apartments, none of which they intended to occupy, but for the sole purpose of showing a greater number of sales than were actually consummated.

The findings and recommendations of the Chief Branch Attorney were sustained by the Area Rent Director of the City of New York, and were thereafter confirmed by the Acting Regional Administrator of the Office of Price Administration for Region II in an opinion in which he stated that the purchasers had not complied with the provisions of Section 6(b)(3) of the Rent Regulation of the Office of Price Administration which required that certificates relating to eviction should only be issued if 80% of the tenants in occupancy at the time of the issuance of the certificates became purchasers of their apartments. The Acting Regional Administrator further denied the claim that the purchasers were entitled to the certificates under the "hardship" provision under the above section, and sustained the findings of fraud and misrepresentation in the procurement of the letter of interpretation. Thereafter, the action of the Chief Branch Attorney, the Area Rent Director, and the Acting Regional Administrator, was reversed by order of the Price Administrator who granted certificates of eviction to the purchasers.

Upon entry of the order granting certificates of eviction, the tenants concerned filed a protest with the Administrator setting forth that the purchasers failed to comply with Section 6(b)(2) of the Rent Regulation, and in each individual case had paid in cash less than the proportionate share of the 20% of the stock purchase price required to be paid in good faith under that section; that the letter of interpretation was unjustified, uncalled for, unwarranted, and secured without a basis in fact or in law; that the facts and documents submitted by the managers of the owning corporation seeking the letter of interpretation as to hardship contained misrepresentations and constituted a fraud upon the Administrator; that the owning corporation was not a cooperative corporation or association, and, there-

fore, did not come within the provisions of the laws and regulations of the Office of Price Administration as to the eviction of tenants of cooperative apartments; that the [fol. 82] sponsors of the cooperative plan acted in bad faith throughout the proceedings; that the property owned by the corporation had no equity over and above its encumbrances; and that the plan for the sale of the shares of stock was fraudulent and infected with bad faith and misrepresentation.

The foregoing protest was dismissed by the Price Administrator on November 2, 1945, on the ground that complainants had no standing to protest his order granting certificates of eviction, since Section 203(a) of the Emergency Price Control Act of 1942, as amended, provides that only persons "subject to" a regulation or order may file a protest thereto with the Administrator; that the Rent Regulations issued by the Administrator or his representatives prohibit or require action only by landlords; and that, therefore, only such persons, and not tenants, are "subject to" the regulations and orders within the meaning of the Act.

Section 203(a) of the Emergency Price Control Act provides that "at any time after the issuance of any regulation or order * * *, any person subject to any provision of such regulation, order or price schedule may * * * file a protest specifically setting forth objections to such provision * * *." In *Buka Coal Co.* v. *Brown*, 133 Fed. (2d) 949 (E. C. A. 1943), it was said that a person is "subject to" a provision of a regulation or order "only if such provision prohibits or requires action by him." The Administrator, therefore, in reliance upon the foregoing, contends that tenants cannot protest the order in this case because they are not "subject to" it, inasmuch as the order granting the purchasers of the apartments authority to proceed with eviction in the local courts does not require or prohibit any action on the part of the tenants, but merely authorizes the purchasers to proceed with their remedies at law to evict; and it is asserted that the Administrator has consistently construed this phrase as applying *generally* to persons of whom action was prohibited or required by a particular provision of a regulation or order." (Italics supplied.)

However valid the interpretation relied upon by the Administrator may be with regard to the standing of a person

generally to protest a price regulation, as illustrated in the Buka case, it does not follow, invariably, that no one can protest a regulation or order, regardless of its nature, unless such order or regulation prohibits or requires action by such a person. For a person may be "subject to" various regulations and orders of the Administrator, in spite of the fact that they do not prohibit or require action by him. This is seen, for example, in the promulgations of the Administrator himself, where in Section 24 of Revised Procedural Regulation No. 1, he provided for an exception to his interpretation that a person is "subject to" the provision of a maximum price regulation only if such provision prohibts or requires action by him. This exception was provided for the benefit of a producer of an agricultural commodity who may complain that a particular price regulation violates Section 3 of the Emergency Price Control Act, or the Stabilization Act, which are designed to protect such producers against the depressing effect upon their prices, of the processor's ceilings, and is found in the following portion of the section of the Revised Procedural Regulation above mentioned:

> "*Provided*, however, That a producer of an agricultural commodity shall be considered to be subject to a [fol. 83] maximum price regulation for the purpose of asserting any right created by section 3(c) of the Emergency Price Control Act of 1942, or section 3 of the Act of October 2, 1942 (Pub. Law 729, 77th Cong.) for the benefit of producers of such an agricultural commodity. Any protest filed by a person not subject to the provision protested, or otherwise not in accordance with this revised procedural regulation, may be dismissed by the Administrator."

Obviously, in the foregoing, the Administrator was not adhering to a consistent and uniform construction that a person is not subject to, and, therefore, cannot protest, a regulation, unless, by the terms of such regulation, he is prohibited from taking, or required to take, some action.

Moreover, we have recognized, in *Illinois Packing Co.* v. *Synder*, 151 Fed. (2d) 337, 338 (E. C. A. 1945), that the construction of the Statute here sought to be given by the Administrator does not apply in a case involving a subsidy regulation where a complainant contends that the regulation

contained an unlawful and discriminatory condition which excluded him from the benefit of the subsidy. In that case, the Administrator in a swer to the claim of the complainant, insisted, upon the authority of the Buka case, that the complainant had no standing to protest the regulation, because it did not require or prohibit any action by complainant. In passing upon the issue thus tendered, this court said:

> "In *Buka Coal Co.* v. *Brown*, 133 F. (2d) 949 (E. C. A. 1943), we accepted the Price Administrator's interpretation of this provision of the Act to the effect that a person is 'subject to' a provision of the maximum price regulation 'only if such provision prohibits or requires action by him.' While this interpretation may be appropriate, so far as concerns the standing of a person to protest a price regulation, it is clearly not an appropriate criterion for determining the standing of a person to protest the kind of regulation now before us, a regulation setting up a scheme of compensatory subsidy payments under defined terms and conditions. If anybody could be 'subject to' a provision of the subsidy regulation, complainant certainly would meet this requirement, since it claims to be excluded from the subsidy by a discriminatory and unlawful condition inserted in the subsidy regulation by Amendment No. 2."

We have seen that producers of agricultural commodities, and claimants to subsidy payments, are considered to be persons subject to the regulations and orders issued by the Administrator, and, therefore, entitled to protest such orders. In the one case, the court, contrary to the decision of the Administrator, declared a person "subject to" a regulation, because he had been excluded from its benefits by a discriminatory condition; in the other case, the Administrator, using the large discretion conferred upon him by the Statute, provided by regulation that a party was "subject to" the regulation, when, otherwise, he would have had no claim or standing to file a protest. Why, then, are not the tenants in this case likewise "subject to" the orders of the Administrator granting certificates to the landlord authorizing him to commence eviction proceedings? [fol. 84] Eviction would mean, in the present housing emergency, that such tenants with their families including, in this case, helplessly stricken invalids, newly returned veterans

of the war, children, and aged people would, in all probability, be deprived of living quarters in the City of New York, where they have been in the past, and are now, bona fide residents. To paraphrase the *Illinois Packing Co.* case, supra, it would seem that "if anybody could be 'subject to' a provision of * * * the Regulation, complainant [in this case, the tenants] certainly would meet this requirement," by any liberal construction of the Act—and we have heretofore held that the provisions of the Price Control Statute are to be given a liberal construction to effectuate their highly remedial purpose. *Automatic Fire Alarm Co. v. Bowles,* 143 Fed. (2d) 602 (E. C. A. 1944).

Contrary to the conclusion entertained in the majority opinion, I am of the view that one of the purposes of the Emergency Price Control Act was to give to tenants a right to remain in possession of the defense-rental area housing accommodations which they might happen to occupy, except for good and sufficient reasons to the contrary; and in the following discussion, I shall attempt to set forth the basis for my view.

In the Statement of Purposes of the Price Control Act as set forth in the first section of that Statute, it is declared that "the purposes of this Act are to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; * * * to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living."

In Section 2(d) of the Act, it is provided:

> "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit . . . speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in . . . rent increases, . . . inconsistent with the purposes of this Act."

Briefly then, by the foregoing section, the Administrator is empowered to issue regulations to effectuate the purposes of the Act, by prohibiting or regulating speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of possession) in connection with any defense-rental area housing accommodations, *which in his judgment are likely to result in rent increases*, inconsistent with the purposes of the Act.

As observed in the accompanying opinion, it is true that the authority of the Administrator—*which is specifically referred to in the above section of the Act*—to regulate practices relating to the recovery of the possession, is incident to his control over improper rent increases. But his power to issue regulations with regard to rents and [fol. 85] tenancies is not limited to such regulation as is necessary to prevent improper rent increases.

In Section 2(g)[1], the Administrator is granted broad general powers to issue regulations to prevent the circumvention or evasion of the Act. Since the purpose of the Act, as stated therein, is to eliminate and prevent manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency, and to protect persons with relatively fixed and limited incomes from undue impairment of their standard of living, which circumvent or evade the Act, the issuance of any regulations for the purpose of protecting such persons from impairment of their standard of living, or to prevent such manipulations and diruptive practices, is authorized by the Statute and is within the intended ambit of its operation.

Whether the purpose of the Act is to restrict the right of a landlord to evict a tenant from his quarters—as well as to establish maximum rents that may be exacted—may be ascertained from an examination of the following provisions of the Statute: In Section 2(b) of the Act, it is provided that the Administrator may adopt regulations

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[1] Section 2(g) provides as follows:

"Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

fixing the rent to be charged; and in Section 2(d), above quoted, the Administrator may restrict the owner's right to terminate the tenant's occupancy, if, in his judgment, it is likely to result in rent increases. In Section 2(g) of the Act, it is provided that regulations issued under the Act shall contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof, and Sections 4(a) and 4(b) provide that it shall be unlawful to violate the regulation fixing rents or to remove or attempt to remove the tenant, or to refuse to renew the lease, because such tenant or occupant has taken, or proposes to take action as required by the Act or regulation or order or requirement thereunder.

From the foregoing, it would appear that one of the purposes of the Statute is to protect the tenants against being forced out of their housing accommodations, without good reason.

In *Snyder* v. *Reshink*, 131 Conn. 252, 38 A. (2d) 803, a well reasoned and persuasive case, the Supreme Court of Errors of Connecticut, in discussing the purposes of the Emergency Price Control Act, observed:

> "The context of the statute in so far as applicable to rents leaves no doubts that a primary purpose is to protect the tenant in defense rental areas, not only against the exaction of excessive rents but also against being forced, without good and sufficient reason, by the owner to remove out and seek quarters elsewhere. Looking to the accomplishment of these ends, the Act provides for the adoption by the Administrator of regulations fixing the rent to be charged and also restricting the owner's right to terminate the tenant's occupancy."

In the instant case, Section 6(a) of the Regulation, applicable to the tenants in this case, provides:

> [fol. 86] "*Removal of tenant—(a) Restrictions on removal of tenant.* So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease

or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease agreement or obligation heretofore or hereafter entered into which provides for entry of judgment upon the tenant's confession for breach of the covenants thereof or which otherwise provides contrary hereto, unless:"

(There follow certain conditions having to do with the tenant's refusal to renew the lease, refusal of access to the landlord, violation of obligation of tenancy or committing nuisance, demolition or alteration by landlord in accordance with law, and occupancy by landlord under a right to buy or a right to possession acquired prior to November 1, 1943.)

Section 6 (b) (2) of the Regulation provides, among other matters, the following:

"*Occupancy by purchaser.* Removal or eviction of a tenant of the vendor, for occupancy by a purchaser who has acquired his rights in the housing accommodations on or after November 1, 1943 is inconsistent with the purposes of the Act and this regulation and would be likely to result in the circumvention or evasion thereof, unless (i) the payment or payments of principal made by the purchaser, excluding any payments made from funds borrowed for the purpose of making such principal payments, aggregate 20% or more of the purchase price, and (ii) a period of three months has elapsed after the issuance of a certificate by the Administrator as hereinafter provided. For the purposes of this paragraph (b) (2), the payments of principal may be made by the purchaser conditionally or in escrow to the end that they shall be returned to the purchaser in the event the Administrator denies a petition for a certificate. If the Administrator finds that the required payments of principal have been made, he shall, on petition of either the vendor or purchaser, issue a certificate authorizing the vendor or purchaser to pursue his remedies for removal or eviction of the tenant in accordance with the requirements of the local law at the expiration of three months after the date of issuance of such certificate."

Section 6 (b) (3) of the Regulation provides that no certificates of eviction shall be issued for occupancy by pur-

chasers of stock in a cooperative, with certain stated exceptions.[2]

What was said in the case of *Snyder v. Reshink*, supra, may well be repeated with respect to the same sections of the Act and largely similar sections of the Rent Regulation, which are here in controversy:

> "The provisions to which we have referred, considered in connection with the context of the Act as a [fol. 87] whole and of the regulation, give expression to a clear intent to safeguard to the fullest possible extent the tenant's right to continuing occupancy."

The conclusion to be drawn from the statute and the sections of the Regulation, in this case, seems to follow; that the purposes of the Act as stated therein, and its various provisions, as well as the pertinent sections of the Regulation, are directed not only toward safeguarding tenants against payment of higher rents in defense-rental areas, but also to the protection of their right to continuing occupancy except for good and sufficient reasons explicitly set forth in the law.

Accordingly, in this case, the tenants have, by virtue of the Statute and the Regulation, a right to remain in possession of the apartments even beyond the term of their leases, except in certain contingencies not here relevant. In this case, they could lose possession only to bona fide purchasers who became proprietary owners of the apartments. Such purchasers are required to comply strictly with various provisions of the regulations. The tenants contend that the so-called purchasers did not, in fact and in law, become owners of the apartments; that the representations upon which such ownership is asserted are fraudulent; that the whole plan by which the original owners procured an interpretation of hardship, upon which the rights of the so-called purchasers depend, was a sham; and that the proceedings in which the order was secured by virtue of which it is sought to evict them are permeated with fraud. They claim that by virtue of the right expressly conferred upon them by the Regulation, they are entitled to

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[2] If a petitioner is seeking a certificate under one of these exceptions, he files, and the certificate is issued, pursuant to Section 6 (b) (2).

possession of the apartments subject to certain well defined exceptions provided for in the Regulation. They claim that none of the exceptions have become operative; that an order based upon the supposition that they had become operative was improvidently issued; and that they are entitled, in defending their possession of the apartments, to protest such order on the ground that it was procured by fraud and misrepresentation and results in a deprivation of their rights. I am of the opinion that their contention should be sustained. A primary purpose of the Statute and the Regulation was to protect tenants in defense-rental areas against being forced by the owners to move out and seek quarters elsewhere, without good and sufficient reasons. These reasons, upon which the owner was bound to reply, in securing certificates of eviction from the Administrator, were in the nature of exceptions to the tenant's right of continuing occupancy. Where persons are granted certain specified rights by the provisions of the Emergency Price Control Act or the regulations issued thereunder, subject, however, to stated exceptions, and it is sought to deprive them of such rights by an order allegedly based upon the exceptions, such persons are entitled to file a protest to such order and contest the issue that such exceptions have become operative, as persons "subject to" the order, within the intendment of Section 203(a) of the Emergency Price Control Act, as amended.

In consideration of the foregoing, a judgment should be entered remanding the case to the Administrator with directions to hear and determine the protest on the merits.

[fol. 93] [Stamp:] United States Emergency Court of Appeals. Filed Mar. 13, 1946. Herman C. Beasley, Clerk.

UNITED STATES EMERGENCY COURT OF APPEALS

No. 271

JACK PARKER, et al.,

vs.

PAUL A. PORTER, Price Administrator

Present: Maris, C. J., and Magruder and McAllister, JJ..

JUDGMENT

This cause came on to be heard on the complaint, Respondent's motion to dismiss complaint and memorandum in support thereof, Complainants' answer and brief in opposition to motion to dismiss, and Complainants' reply memorandum, and was argued by counsel.

Upon consideration whereof, and the Court being of opinion that it is without jurisdiction to entertain the complaint, it is now here ordered and adjudged that the complaint herein be, and it hereby is, dismissed.

It is further ordered that the Clerk of this Court transmit forthwith a certified copy of the judgment to the Price Administrator.

By the Court.

Teste: Herman C. Beasley, Clerk, by J. Frederick Mattingly, Chief Deputy Clerk.

[fol. 94] UNITED STATES EMERGENCY COURT OF APPEALS

I, Herman C. Beasley, Clerk of the United States Emergency Court of Appeals, hereby certify that the foregoing printed, typewritten and mimeographed pages, numbered from 1 to 93, both inclusive, constitute a true copy of

(1) Complaint
(2) Proceedings in the United States Emergency Court of Appeals

in the case of:

No. 271

JACK PARKER, et al.,

vs.

PAUL A. PORTER, Price Administrator

as the same remain upon the files and records of said United States Emergency Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Emergency Court of Appeals, at the City of Washington, this 25th day of March, A. D. 1946.

Herman C. Beasley, Clerk, United States Emergency Court of Appeals. (Seal.)

[fol. 90] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 13, 1946

The petition herein for a writ of certiorari to the United States Emergency Court of Appeals is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

IN THE

Supreme Court of the United States

October Term, 1945

JACK PARKER, ISIDOR M. SAKS, MELVIN CAPLAN, DAVID WERTH, C. CLARENCE KASKEL, MORTON H. BARON, ROBERT HERMANN, SAMUEL OGUS, CHARLES MASLOW, GEORGE WILLETT, HARRY WIENER, CHARLES GOLDMAN, DAVID RUDBERG, WILLIAM I. HOHAUSER AND SYDNEY MAYBAUM,

Petitioners,

—vs—

PAUL A. PORTER, Price Administrator.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Emergency Court of Appeals dismissing their complaint on the ground of lack of jurisdiction, which complaint was filed to review the respondent's dismissal of their protest filed to respondent's order granting certificates of eviction against the petitioners.

Opinions Below.

The majority and dissenting opinions of the Emergency Court of Appeals (reported in C. C. H. 3 P. C. 52, 522) (pp. 74-87) appear in the record.

Jurisdiction.

The judgment of the United States Emergency Court of Appeals sought to be reviewed was entered March 13, 1946. (p. 88). Jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App. Sec. 92(d), as amended.

Questions Presented.[1]

1. Whether under the fundamental purpose and intent of the defense housing provisions of the Emergency Price Control Act of 1942 and the Rent Regulation for Housing in the New York City Defense-Rental Area (8 Fed. Reg. 13914) petitioners-tenants have a right to remain in possession of the defense-rental area housing accommodations which they occupy and, therefore, are "subject to" respondent's order authorizing their eviction with standing to file a protest against said order under Sec. 203(a) of the Emergency Price Control Act and to file a complaint in the Emergency Court of Appeals under Sec. 204(a) of said act, or whether the sole purpose of the Emergency Price Control Act relative to defense housing was to control the amount of rents of such accommodations and to prevent speculative, unwarranted and abnormal increases therein with the result that tenants have no right to remain in possession, and have no standing to file a protest under Sec. 203(a), or a complaint under Sec. 204(a), of the Emergency Price Control Act.

2. Whether Sec. 203(a) of the Emergency Price Control Act authorizes the filing of a protest by the petitioners with respondent to contest the propriety of an order issued by respondent which authorizes certain alleged purchasers

[1] Petitioners respectfully reserve the right to argue other questions involved in this appeal in the event this petition is granted.

of stock, who obtained proprietary leases of apartments, in defense-area housing accommodations, to pursue their remedy at local law to evict petitioners, who are tenants of such accommodations.

3. Whether Sec. 204(a) of the Emergency Price Control Act authorizes the filing of a complaint by petitioners with the Emergency Court of Appeals to review the action of the respondent in dismissing, on procedural grounds, their protest contesting the validity of respondent's order which authorizes the pursuit of local remedies to evict the petitioners.

4. Whether the denial to petitioners of a right to file a protest to the order of the respondent (pursuant to Sec. 203(a) of the Emergency Price Control Act), which permitted certain alleged purchasers of stock, who obtained proprietary leases of apartments in defense area housing accommodations occupied by petitioners, to pursue their local remedy to evict petitioners, and whether the further denial to said petitioners of the right to file a complaint in the Emergency Court of Appeals (pursuant to Sec. 204 (a) of the Emergency Price Control Act), reviewing the denial of said protest, constitute a deprivation of property without due process of law.

5. Whether under Sec. 6(a) of the Rent Regulation for Housing in the New York City Defense-Rental Area petitioners are entitled to a judicial examination into the question of compliance by purchasers with the provisions of Sec. 6(b)(2) of said Regulation, where petitioners assert that such regulation has not been complied with and that the purchasers' application to evict petitioners was based on fraud and misrepresentations.

6. Whether petitioners having been invited by respondent to submit information on the original hearings on purchasers' application for certificates of eviction and having answered and participated in the hearings before the local office of Price Administration authorities to their conclusion had legal status to protest respondent's order which reversed the local and regional authorities.

Statutes and Regulations Involved.

The pertinent provisions of the Emergency Price Control Act, as amended, and of the Rent Regulation for Housing in the New York City Defense-Rental Area (7 Fed. Reg. 13914) promulgated by respondent appear herein.

Statement.[2]

Petitioners are tenants of certain apartments within the New York City defense-rental area owned by the Fifty-Five Corporation which sought to convert twenty-eight of these apartments into cooperatives by offering for sale shares of stock in such owning corporation to certain purchasers, with proprietary leases for a term of years of the apartments involved. The purchase price for such apartments under the proposed ownership sharing plan aggregated approximately $390,000 over and above a first mortgage of $1,500,000 (pp. 1, 3, 8).

While the cooperative was being organized, the managing agents of the owning corporation wrote the Chief Attorney for the New York City Defense-Rental Area, of the Office of Price Administration, on March 5, 1943 requesting an interpretation concerning the right of purchasers of such cooperative apartments in 55 Central Park West, to obtain

[2] Statement adopted from dissent of Judge McAllister of the Emergency Court of Appeals.

certificates of eviction under the provisions of Subdivision II of Section 6(b)(3) of the Rent Regulations of the Office of Price Administration. This section provides that where a cooperative is organized on or after February 17, 1945, no certificate of eviction shall be issued, unless on such date, stock in the cooperative had been purchased by persons who were then tenants of at least 80% of the apartments in the premises, or unless on such date the cooperative was in the process of organization and the Administrator finds that substantial hardship would result from the failure to issue such a certificate (p. 8).

The owners and brokers based their application for an interpretation on the latter portion of the section—that is, on the claim that substantial hardship would result to the owners of the capital stock of the corporation if they were not permitted to proceed with the conversion of some of the apartments into cooperatives under the regulations existing prior to February 17, 1945. Annexed to their letter requesting the interpretation of the right of purchasers of such cooperative apartments to obtain certificates of eviction were certain affidavits and exhibits. On March 23, 1945, an interpretation of hardship, in favor of the owning corporation, was granted by the Office of Price Administration—erroneously, and because of fraudulent misrepresentations, as contended by the tenants—and the representatives of the owning corporation were authorized to proceed with the share-ownership plan under the regulations in existence prior to February 17, 1945. Thereafter, the alleged purchasers of the apartments involved herein applied for certificates of eviction from the Price Administrator, based on a claimed compliance with Section 6(b)(2) of the Rent Regulation for Housing in the City of New York, in effect prior to February 17, 1945, which required that the purchasers of stock for the purpose of carrying out the cooperative ownership plan, must have paid 20% of the